

13:12:40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GERARD SZUBIELSKI,)
)
) Plaintiff,)
) C.A. No. 15-984 (RGA) (JLH)
v.)
)
WARDEN DAVID PIERCE,)
et al.,)
)
) Defendants.)

Wednesday, July 7, 2021
9:10 a.m.
Jury Trial

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JENNIFER L. HALL
United States District Court Magistrate Judge

APPEARANCES:

TROUTMAN PEPPER HAMILTON SANDERS LLP
BY: JOANNA J. CLINE, ESQ.
BY: COURTNEY A. MUNNINGS, ESQ.
BY: KARLI E. COZEN, ESQ.
BY: LAURENCE Z. SHIEKMAN, ESQ.
BY: NICOLE CROSSEY, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2
3 DELAWARE DEPARTMENT OF JUSTICE
4 BY: KENNETH LEE-KAY WAN, ESQ.
5 BY: ALLISON JEAN McCOWAN, ESQ.
6 BY: REBECCA SONG, ESQ.

7 Counsel for the Defendant

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09:11:11 1 relatively self explanatory. At 4:23 this morning I
09:11:16 2 received an e-mail from Mr. Pierce --

09:11:18 3 THE COURT: You can come to the podium.

09:11:19 4 MR. WAN: Okay. I didn't know what the rules
09:11:22 5 were. I apologize, Your Honor.

09:11:24 6 -- that he was suffering from severe stomach
09:11:27 7 pain and uncontrollable vomiting due to a chronic illness he
09:11:33 8 had. He still continued to experience the symptoms
09:11:35 9 throughout the morning. I tried to call him, he didn't pick
09:11:38 10 up. I don't know, he did mention that whatever the
09:11:41 11 conditions required, whether they required hospitalization,
09:11:44 12 I don't know whether he's in there or not, but, you know,
09:11:47 13 the fact is that I believe a continuance is warranted for a
09:11:50 14 number of reasons. One, I don't believe Mr. Pierce is in
09:11:53 15 condition to stand trial. And even if he were to be brought
09:11:56 16 in here, I'm not sure uncontrollable vomiting is something
09:12:00 17 you want to have in the courtroom right now, especially with
09:12:03 18 the whole COVID thing. And even not, I think it would be
09:12:06 19 distracting for everyone if that was going on, so I think
09:12:10 20 there are concerns here, so I think a continuance is
09:12:13 21 warranted in this case, Your Honor.

09:12:16 22 THE COURT: Mr. Wan, I should have said you're
09:12:19 23 welcome to take your mask off while you're at the podium. I
09:12:22 24 know you have represented Mr. Pierce in other cases. Do you
09:12:25 25 have any more information about the nature of this

condition? And the reason why I'm asking is that I'm trying to get a sense of when you think he's likely to be able to come in and testify. And just to put it all out on the table, I want to try to salvage getting this trial moving if we can. We have ninety jurors here that have showed up for service. I know both sides are interested in getting this case tried and I can think of various scenarios where we could pick a jury today, get started tomorrow or Friday and have him testify Monday. But I need to have some sense of whether or not that's something that is feasible.

MR. WAN: Your Honor, I guess I don't want to go too much into his medical condition, but I believe --

MS. McCOWAN: I know there may be members of the public in the room, so he has a chronic stomach condition that does lead to hospitalization. And we do have that consent this morning but we didn't want to put it on the public record if Your Honor is interested in that. From my understanding from the medical condition it general -- it may require hospitalization. It will take five days to a week to resolve.

THE COURT: Could I see a copy of the letter? Do you have a copy by any chance for opposing counsel?

MR. WAN: The letter or the e-mail?

THE COURT: The e-mail.

MR. WAN: The sum of it is attorney/client

09:13:57 1 privilege, but I'll show it to them.

09:13:59 2 THE COURT: If you don't want to waive
09:14:01 3 privilege, I completely understand if it has to do with --

09:14:05 4 MR. WAN: I guess the e-mail itself, it is in
09:14:08 5 response to the e-mail I sent him.

09:14:10 6 THE COURT: Let's do this. Why don't we take a
09:14:13 7 side-bar and to the extent there is details about medical
09:14:17 8 condition you want read in open court, but are you still
09:14:20 9 able to tell us what you can tell us at side-bar, so why
09:14:25 10 don't we -- I don't have a mask. I can represent that I
09:14:27 11 have been fully vaccinated. Does anyone have any objection
09:14:30 12 to discussing anything with me at side-bar?

09:14:32 13 MR. WAN: No.

09:14:33 14 (Side-bar discussion.)

09:25:41 15 THE COURT: Do you have any objection to Mr. Wan
09:25:41 16 having his mask off?

09:25:41 17 MS. CLINE: Not to that.

09:25:41 18 THE COURT: If you could just give us some more
09:25:41 19 detail.

09:25:41 20 MS. McCOWAN: He has Crohns disease and so --
09:25:41 21 and Irritable Bowel Syndrome, so if he's experiencing a
09:25:41 22 Crohns flair up, he may likely require hospitalization. I
09:25:41 23 know this is based on prior cases that we have represented
09:25:41 24 Mr. Pierce with.

09:25:41 25 THE COURT: Have you had to continue a trial

09:25:41 1 before in any other case?

09:25:41 2 MS. McCOWAN: No, not in those cases.

09:25:41 3 THE COURT: And I'm just thinking off of my head
09:25:41 4 here. It seems to me that this is something that might be
09:25:41 5 exacerbated by the stress caused by a trial. If this could
09:25:41 6 happen again, so I'm wondering again is it more -- are we in
09:25:41 7 a better chance of getting him on the stand on Monday or a
09:25:41 8 month from now, or is it the same?

09:25:41 9 MS. McCOWAN: We had a four-day trial at the
09:25:41 10 start of June and had no issues and that was a much more
09:25:41 11 contentious trial with more claims. To my knowledge we
09:25:41 12 haven't had an issue with it being exacerbated.

09:25:41 13 MR. WAN: I was in trial with Mr. Pierce with
09:25:41 14 Judge Andrews from June 10th to June 12th with Mr. Pierce
09:25:41 15 there. He didn't have that issue there. I would think it
09:25:41 16 would be less of a -- I'm sure the stress doesn't help it
09:25:41 17 right now, but if I had to guess, I think it would be more
09:25:41 18 that once he recovers, he'll be okay. But like I said, I do
09:25:41 19 apologize, it takes a lot --

09:25:41 20 THE COURT: Let me ask you this. Your letter
09:25:41 21 has said that it could last for days. You mentioned here a
09:25:41 22 week. Do you have a sense from him whether it's days or
09:25:41 23 whether it's a week?

09:25:41 24 MR. WAN: It says a few days, so -- I'm sorry, a
09:25:41 25 couple of days, so.

09:25:41 1 MS. SONG: Your Honor, we got this e-mail at
09:25:42 2 4:23 this morning and unfortunately at this time we don't
09:25:42 3 have enough information to relay to the Court how much time
09:25:42 4 he will need to recover. We don't want to suggest Monday
09:25:42 5 and then come back and say it's not right.

09:25:42 6 THE COURT: I also don't want to send ninety
09:25:42 7 people home and plaintiff's counsel has already incurred the
09:25:42 8 charge for the jury consultant as well.

09:25:42 9 Let's hear from counsel.

09:25:42 10 MS. CLINE: So respectfully this case was filed
09:25:42 11 in 2015. Our client has waiting for his day in court since
09:25:42 12 then. We got to the summary judgment stage in 2020. The
09:25:42 13 hearing was postponed at the state's request because of the
09:25:42 14 COVID hardship with then counsel's representing statement
09:25:42 15 and the trial date was pushed for COVID. Now we're here.
09:25:42 16 Our client has been transferred from Sussex. Without going
09:25:42 17 into details or waiving privilege, I can represent that he
09:25:42 18 has mental illness and it was a huge deal for him to be
09:25:42 19 moved. And this whole trial process and preparation process
09:25:42 20 has been a big deal. My colleagues prepped him over the
09:25:42 21 holiday weekend. The jury is here. We have people that
09:25:42 22 traveled from Philadelphia, Princeton.

09:25:42 23 We did a quick look at the case law this
09:25:42 24 morning. Our understanding is that Mr. Pierce has no
09:25:42 25 constitutional right to be present, Arrington v. Robinson,

09:25:42 1 Third Circuit 1940, he can be represented in person or by
09:25:42 2 counsel. I think he's ably represented here by counsel.

09:25:42 3 His counsel told us yesterday that Mr. Pierce
09:25:42 4 didn't plan to be present on Friday for the trial which is
09:25:42 5 presumably the day the jury is going to render the verdict.
09:25:42 6 Respectfully with no disrespect to our colleagues with
09:25:42 7 respect to the illness, we have no good showing, we have no
09:25:42 8 note from the doctor. If this illness was chronic, he would
09:25:42 9 have known about it and taken precautionary measures. We
09:25:42 10 have no idea if this will happen again if it's continued.

09:25:42 11 And just to reiterate, to do this to Jerry is
09:25:42 12 sort of reminiscent of the reason we're here to begin with
09:25:42 13 Warden Pierce, he was declassified so he could come out of
09:25:42 14 solitary. Our contention is the warden vetoed that. And
09:25:42 15 now we're here to have our day in court and the warden is
09:25:42 16 vetoing that again. And we object to the continuance.

09:25:42 17 THE COURT: While we're still at side-bar, let's
09:25:42 18 see if there are any other questions from plaintiff's
09:25:42 19 counsel that pertain to matters that need to be held at
09:25:42 20 side-bar, then we can move back into open court. Is there
09:25:42 21 any other information?

09:25:42 22 MR. WAN: This is the e-mail if you want to look
09:25:42 23 at it.

09:25:42 24 THE COURT: I'm disinclined to look at it if you
09:25:42 25 think there might be privileged communications there,

09:25:43 1 because I don't want to see it if you can't show it to the
09:25:43 2 other side. But if there is any other information in there
09:25:43 3 that relates to his prognosis or how long he is not likely
09:25:43 4 to attend trial, that would be helpful.

09:25:43 5 MR. WAN: Your Honor, I can try giving him a
09:25:43 6 call again just to give you more information. I understand
09:25:43 7 the position here. It's tough to get a doctor's note
09:25:43 8 between 4:00 a.m. and 7:00 a.m.

09:25:43 9 THE COURT: Understood.

09:25:43 10 MR. WAN: He was in trial just last month, so
09:25:43 11 it's hard for me to say it would happen again, because he
09:25:43 12 was just in trial for three or four days.

09:25:43 13 THE COURT: Let's move to open court and we'll
09:25:43 14 continue the discussion.

09:25:43 15 (End of side-bar.)

09:25:43 16 THE COURT: So here is what I think we should do
09:25:43 17 and then I want to take a recess and we're going to look at
09:25:43 18 if we can get this accomplished. What I propose that we do
09:25:43 19 is that we pick the jury today. I propose we tell the jury
09:25:43 20 that you will come back Friday or Monday for their first day
09:25:43 21 of testimony. I don't know what order the parties intend to
09:25:43 22 present their case. I don't know if plaintiff intended to
09:25:43 23 call Warden Pierce live. I don't know if plaintiff has an
09:25:43 24 objection to going out of order if we need to hear from one
09:25:43 25 of defendant's first witnesses before we hear from Warden

09:25:43 1 Pierce. I don't know if plaintiff would be satisfied with
09:25:43 2 some combination of deposition and live testimony or if the
09:25:43 3 defendant objects to that.

09:25:43 4 What I do know is that we did have a prior
09:25:43 5 request from Warden Pierce to come and go during the trial,
09:25:43 6 and so to the extent that the state is still satisfied with
09:25:43 7 not having him there for the entire trial period, that's
09:25:43 8 something that I would like to explore whether or not we can
09:25:43 9 have him come in to do his testimony next week.

09:25:43 10 It's Wednesday morning now, and so Thursday,
09:25:43 11 Friday, Saturday, Sunday, Monday, that's five days from now
09:25:43 12 if he testifies Monday. It's six days if he testifies
09:25:43 13 Tuesday. I don't know what the parties' schedules are, but
09:25:43 14 I do know that plaintiff is prepared for trial. I know
09:25:43 15 defense counsel wants to go to trial. I know the parties
09:25:43 16 have expended a great deal of time and expense getting
09:25:43 17 ready. And I know that we've got seventy-five people
09:25:43 18 downstairs, some of whom have driven more than an hour to
09:25:43 19 get here. And so I think we need to try to work this out.

09:25:43 20 So what we're going to do is we're going to take
09:25:43 21 a brief recess. The state is going to make all attempts to
09:25:43 22 try to contact Mr. Pierce and see if we can get more details
09:25:43 23 on whether or not he can come in to testify. And the
09:25:43 24 parties are going to work together in the meantime to try to
09:25:43 25 figure out a plan for how we can get this case tried. Okay?

09:25:44 1 Go ahead, Ms. Cline.

09:25:44 2 MS. CLINE: May I be heard?

09:25:44 3 Just so everybody has the information, we were
09:25:44 4 intending today to proceed with jury selection, openings,
09:25:44 5 and then we were going to put Jerry on as our first witness.
09:25:44 6 We were then going to do either Mr. Scarborough or
09:25:44 7 deposition testimony. So from our perspective, all of that
09:25:44 8 has got to take all day. And we would like to just
09:25:44 9 continue, and then tonight we can assess whether we would
09:25:44 10 agree to perhaps using Warden Pierce's dep testimony in lieu
09:25:44 11 of live testimony and see whether he's able to come in
09:25:44 12 tomorrow.

09:25:44 13 THE COURT: So the only thing I would say about
09:25:44 14 that is this, and maybe after the parties have had a chance
09:25:44 15 to talk together about what their preferences are, then we
09:25:44 16 can see if the Court needs to make a ruling about anything.

09:25:44 17 What I would like to do if we could and if it
09:25:44 18 makes sense is pick the jury today and then wait until
09:25:44 19 tomorrow, that way by tomorrow for whatever reason we have
09:25:44 20 more information, and if it turns out we do need to
09:25:44 21 reschedule that we wouldn't have gone through a whole day of
09:25:44 22 testimony and put everybody through that. But if that's not
09:25:44 23 what you prefer, talk to each other about that and then I
09:25:44 24 can resolve any disputes.

09:25:44 25 Any questions about what I'm asking folks to do

09:25:44 1 during the recess?

09:25:45 2 MR. WAN: Not from the state, Your Honor.

09:25:45 3 MS. CLINE: Not from us.

09:25:45 4 THE COURT: Ms. Garfinkel, do we have everyone's
09:25:45 5 contact information or do you know how to get in touch with
09:25:45 6 Ms. Garfinkel? Please let us know. We'll check back in
09:25:45 7 with you in about twenty, thirty minutes and just see how
09:25:45 8 things are progressing, and then we'll go from there. But
09:25:45 9 we do have a number of folks that are waiting around
09:25:45 10 upstairs. So if you could move rapidly, I would appreciate
09:25:45 11 it.

09:25:45 12 MR. WAN: Of course, Your Honor.

09:25:45 13 THE COURT: We'll be in recess.

09:25:45 14 (A brief recess was taken.)

09:55:55 15 THE COURT: Please be seated.

09:56:02 16 So who wants to talk first?

09:56:05 17 MR. WAN: I got it.

09:56:07 18 Good morning, again, Judge Hall. Kenneth Wan.

09:56:12 19 So we've kind of come to an agreement, but just
09:56:12 20 to update with Mr. Pierce, I was able to speak to him and he
09:56:20 21 was on the upswing now and he's confident he can come in
09:56:24 22 tomorrow.

09:56:24 23 We also learned that Mr. Szubielski was not
09:56:24 24 transferred over today and we're not exactly sure how
09:56:30 25 quickly he can get here, today, tomorrow, Friday. So our

09:56:34 1 proposed plan is to maybe pick a jury today. And I believe
09:56:40 2 that plaintiffs said that Mr. Szubielski didn't need to be
09:56:44 3 present for it. If he can get here this afternoon -- maybe
09:56:47 4 pick one this afternoon if he can get here hopefully and
09:56:51 5 then proceed starting tomorrow with openings and evidence.
09:56:56 6 But I don't know what the position, depending on whether or
09:57:00 7 not Mr. Szubielski can be transported here, but I think the
09:57:03 8 tentative plan is to pick a jury this morning or this
09:57:07 9 afternoon and start tomorrow. And I'll let plaintiff's
09:57:10 10 counsel continue from there.

09:57:12 11 THE COURT: Okay. Ms. Cline, please feel free
09:57:15 12 to take your mask off if you're comfortable. You're welcome
09:57:18 13 to keep it on.

09:57:20 14 MS. CLINE: Thank you. I appreciate that. I
09:57:23 15 agree with what Mr. Wan is saying. We would like to move
09:57:26 16 for an oral motion for a writ if that's at all possible to
09:57:30 17 get Mr. Szubielski here. We don't know how long that would
09:57:34 18 take. The state has been nice enough to grease the skids on
09:57:37 19 the state's side. I know there is coordination with the
09:57:42 20 wardens. If it is possible to get Mr. Szubielski here for
09:57:45 21 jury selection, we would like to wait until this afternoon.
09:57:48 22 If there is no chance of getting transported today, we're
09:57:52 23 okay with picking the jury now and proceeding tomorrow. We
09:57:55 24 think he would like to be here, but if the downside is not
09:57:58 25 proceeding, we would like to proceed and get his day in

09:58:00 1 court.

09:58:00 2 THE COURT: There is two things that come to
09:58:02 3 mind, so I'll throw it out there and you can see where we're
09:58:05 4 at. The first is that in my experience it's exceedingly
09:58:09 5 unlikely to get somebody here on the same day if you didn't
09:58:12 6 get a writ over. And that's not only because it's an issue
09:58:17 7 getting them released from state custody, but more a matter
09:58:20 8 of having the marshals have a plan for what happens once the
09:58:24 9 prisoner gets to the courthouse. And so I don't pretend to
09:58:29 10 understand all of their operations, but I do know that
09:58:31 11 they're complicated and that's to keep everyone in the
09:58:34 12 courtroom safe as well as make sure that the prisoner is
09:58:36 13 brought over according to regulations. So there is that to
09:58:41 14 keep in mind.

09:58:43 15 The second thing to keep in mind is that we had
09:58:46 16 discussed at the pretrial conference whether or not he would
09:58:49 17 even be back during the voir dire process. I don't know if
09:58:52 18 you had come to a conclusion about that.

09:58:55 19 MS. CLINE: Well, so maybe I am misunderstanding
09:58:58 20 the process. We were thinking he would be in the courtroom,
09:59:01 21 but to the extent there needed to be a dialogue in closed
09:59:04 22 quarters, we were okay not doing that knowing the --

09:59:07 23 THE COURT: I'll tell you how it would normally
09:59:10 24 go. It's little bit different because of COVID. We're
09:59:13 25 going to have twenty-eight folks brought up and they are

going to be placed in each one of those green dots you see in the gallery there. The first fourteen are going to be on my left and the last fourteen are going to be on my right. We're going to read all the voir dire on the Court's approved voir dire we had objections to, otherwise no objections, and each of the members of the venire are going to have a pen and circle what they had yes answers to.

At that point in time, we're all going to move back to Judge Burke's jury room and Ms. Garfinkel is going to proceed amongst the venire and ask them if they had yes answers. And if they do, they're going to be brought back there.

So to the extent that weighs in on how much your client wants to be present, I think what he would be missing is us reading the proposed instructions, and then he obviously wasn't going to be back in chambers for that part anyway unless we got some sort of a plan worked out. And then once we come back into the courtroom, the preemptory challenge process is a process of Ms. Garfinkel going back and forth from counsel table with a clipboard when you strike whoever you want to strike. That's what it is.

I don't know if you need a few minutes to discuss with co-counsel, but in the meantime while you're doing that, I'm going to talk to Ms. Garfinkel about the logistics of getting somebody writed over.

10:00:52 1 MR. WAN: I understand traditionally plaintiffs
10:00:54 2 are over on this side and defendants are over there when you
10:00:59 3 have an incarcerated person come over. I don't know what
10:01:04 4 the Court's preference is.

10:01:05 5 THE COURT: That's one of those things that
10:01:06 6 we'll ask the marshals once we know we got a guy coming over
10:01:10 7 for trial, which I don't think they did. But we'll keep
10:01:14 8 that in mind.

10:01:16 9 Let me just consult with Ms. Garfinkel.

10:02:34 10 (Pause.)

10:02:34 11 Ms. Cline.

10:02:37 12 MS. CLINE: So let me try to answer the Court's
10:02:40 13 question. In light of the logistics and the way it's going
10:02:42 14 to work including with the CO hovering over Jerry, we waive
10:02:47 15 the right to have him back when we're questioning the
10:02:50 16 jurors.

10:02:50 17 And I guess the remaining question mark is
10:02:52 18 neither side has been able to obtain a list of prospective
10:02:54 19 jurors from jury administration. If the Court could
10:02:59 20 facilitate that, we would like to get a look at the list.

10:03:02 21 THE COURT: Absolutely. Okay. So we have got a
10:03:05 22 few things we're working on here. So the first thing is
10:03:08 23 that your oral motion for a writ is granted. We'll make
10:03:13 24 that out and fill it out. We'll get it sent over. It's not
10:03:17 25 entirely clear to me that we could get him here even

10:03:20 1 tomorrow morning, and so we're going to take a brief recess
10:03:24 2 and figure out if that's even possible to get him here
10:03:28 3 tomorrow. If not, we'll plan to move forward on Friday.

10:03:35 4 And then we're going to get an answer, because I
10:03:38 5 would like to have an answer of when the jurors need to
10:03:41 6 appear for opening statements and the reason why, part of
10:03:46 7 the voir dire is going to be asking them about their
10:03:48 8 availability. And if we got folks that are leaving
10:03:51 9 Wednesday for their beach vacation, we need to know that so
10:03:54 10 we can make sure we don't call someone, we need to know when
10:03:58 11 we're going to start, basically.

10:04:01 12 Anything else we need to address right this
10:04:04 13 second before we take a brief recess to get an answer to
10:04:08 14 when we can get him over here?

10:04:10 15 MR. WAN: Not from the defense.

10:04:12 16 MS. CLINE: Not from us, either.

10:04:13 17 THE COURT: Very good. We'll be in a brief
10:04:17 18 recess.

10:04:17 19 (A brief recess was taken.)

10:45:00 20 THE COURT: Please be seated.

10:46:20 21 Okay. So it sounds like we got some of the
10:46:30 22 issues worked out. So my understanding how we're going to
10:46:35 23 proceed is we're going to go ahead and try to pick a jury
10:46:40 24 today before lunch. And then depending on what time it is,
10:46:45 25 we can either let the jury go to lunch and come back and

1 read the preliminary jury instructions or we can ask them if
2 they want to just plow through and do the preliminary jury
3 instructions and then we'll cut them loose.

4 I do understand there is some possibility of
5 getting the plaintiff here today. I am disinclined to get
6 started today for a couple of reasons. One is that it's
7 already getting to be late in the morning, so the chances of
8 getting a big chunk of testimony in today are rapidly
9 diminishing because we still do have to read the preliminary
10 jury instructions.

11 And the other thing is that I'm worried about if
12 there is another snafu that we don't have the jury sitting
13 around waiting. So I would like to cut them loose if there
14 is a possibility to cut them loose. I don't think it's
15 right given that we've had them here waiting all morning.

16 Does anyone have anything they want to say for
17 the record about anything I have said so far?

18 MS. CLINE: We're okay with that, Your Honor.

19 THE COURT: Thank you.

20 MR. WAN: We have no objection to that, Your
21 Honor.

22 THE COURT: Very good. There is only one other
23 housekeeping matter I want to talk to you about before I
24 bring the jury in. I'm not sure if Judge Andrews discussed
25 with you at the first pretrial conference that we had sent

10:48:06 1 out a COVID questionnaire to this venire and it has a number
10:48:11 2 of questions, including whether or not the juror has been
10:48:14 3 vaccinated and whether they have any health concerns about
10:48:19 4 themselves or their family members related to this COVID 19
10:48:23 5 pandemic.

10:48:27 6 We took a look at those questionnaires and we
10:48:30 7 did excuse a couple of jurors before today. They're not
10:48:37 8 going to be on the list that you have in front of you right
10:48:39 9 now because they have already been excused, but I can tell
10:48:44 10 you that we've excused jurors if they said that they had
10:48:48 11 symptoms in the last two weeks. We excused jurors who
10:48:52 12 indicated that they had family members that were high risk
10:48:56 13 or needed to be supervised at home. We also excused one
10:49:01 14 potential juror because that juror indicated that they were
10:49:05 15 not vaccinated and did not intend to wear a mask. And given
10:49:11 16 some concerns that have been raised by other jurors that
10:49:16 17 were selected about that they didn't have an issue unless
10:49:21 18 there were unvaccinated people without masks, we thought the
10:49:24 19 best was to excuse that juror.

10:49:29 20 Does anyone have any questions?

10:49:32 21 MR. WAN: Not from the defense.

10:49:35 22 MS. CLINE: Not from us.

10:49:38 23 THE COURT: Okay. So we'll hear about any
10:49:42 24 further COVID concerns today when we bring the jury back for
10:49:45 25 the follow-up voir dire questioning and we -- before if

10:49:44 1 there are no objections we're going to move forward with the
10:49:47 2 way that we've discussed.

10:49:51 3 With that, I'll ask Ms. Garfinkel to bring in
10:49:56 4 the venire.

10:49:57 5 Any questions, Mr. Wan?

10:49:58 6 MR. WAN: Your Honor, I had two kind of quick
10:50:01 7 housekeeping matters for Mr. Pierce. One thing was we were
10:50:04 8 trying to get him in one day. I think the plaintiffs may be
10:50:09 9 able to accommodate that. One question I had was to
10:50:12 10 facilitate getting him in and out in one day, would it be
10:50:14 11 okay after they finished their direct when we call him in
10:50:20 12 our case in chief I just do my questions with him?

10:50:25 13 THE COURT: If there is no objection from the
10:50:26 14 other side.

10:50:32 15 MS. CLINE: No objection.

10:50:33 16 THE COURT: Okay. And what I am going to say is
10:50:38 17 that I'll reserve ruling on that. Let's get the jury
10:50:41 18 selected and then after we cut them loose for today, then we
10:50:47 19 can deal with any other matters that we need to deal with
10:50:50 20 before the testimony begins.

10:50:52 21 Is there anything else we need to deal with
10:50:54 22 today that has to do with the jury selection process?

10:50:58 23 MS. CLINE: Well, one question which may or may
10:51:00 24 not directly relate. There is some confusion around where
10:51:02 25 we're supposed to sit. Obviously we would like to sit near

10:51:07 1 the jury. Obviously there is some concern with the marshals
10:51:10 2 need to be over there. I don't know if it would be weird
10:51:14 3 for the jury if we switched between today and tomorrow.

10:51:16 4 THE COURT: That's a good question.
10:51:18 5 Unfortunately I don't have a sense right now given the way
10:51:21 6 things have played out this morning about what the logistics
10:51:25 7 are going to be. Are you inclined to want to switch now if
10:51:30 8 you're going to switch?

10:51:35 9 MS. CLINE: I think we would rather stay here
10:51:37 10 for now.

10:51:37 11 THE COURT: All right. I can tell them that
10:51:40 12 maybe -- I could give them tomorrow if it turns out we do
10:51:41 13 need to switch, you all can agree on what I am going to say
10:51:41 14 to them if you like.

10:51:50 15 MS. CLINE: Thank you, Your Honor.

10:51:50 16 THE COURT: With that I'll ask Ms. Garfinkel to
10:51:54 17 bring in the venire.

10:52:21 18 So one thing I should say about the voir dire is
10:52:21 19 I modified it very slightly to indicate that we expect to be
10:52:32 20 here no later than Monday afternoon as opposed to Friday
10:52:32 21 afternoon. Any objection to that change?

10:52:32 22 MS. CLINE: Not from us.

10:52:40 23 MR. WAN: I would say no, Your Honor.

10:52:42 24 Can we swing our chairs around so the venire is
10:52:42 25 going to be behind us? How would the Court like us to

10:52:49 1 proceed?

10:52:49 2 THE COURT: Most of this is going to be me
10:52:51 3 reading from the sheet, so it's fine if you want to face
10:52:55 4 them when it's your turn to introduce yourself, I think it
10:52:59 5 would be fine to spin around.

10:53:09 6 The other thing I would say while we're waiting
10:53:12 7 for prospective jurors to get here, it might make sense if
10:53:16 8 you just want to lower your mask when you introduce yourself
10:53:20 9 or when we get to the part where I'm introducing you so they
10:53:25 10 can see your face and see if you're somebody that they
10:53:27 11 recognize. We can discuss the logistics of mask wearing
10:53:31 12 this afternoon after we get the jurors sworn in and we can
10:53:34 13 talk about what makes the most sense because I think it
10:53:39 14 might depend on who is part of the panel.

11:03:45 15 (Jury panel entered the courtroom at 11:03 a.m.)

11:04:07 16 THE COURT: Good morning, everyone. A special
11:04:43 17 welcome to the members of our jury pool. I am Judge Hall.
11:04:48 18 I am a judge here in the United States District Court for
11:04:51 19 the District of Delaware. I want to begin by thanking all
11:04:56 20 of you for taking time from the schedule and from your lives
11:04:59 21 to be here and to be available to do the important service
11:05:05 22 that we all share as citizens, possibly serving on a jury.
11:05:12 23 I want to apologize for the delay in getting you up here
11:05:14 24 today.

11:05:19 25 I will explain to you in a moment in some detail

11:05:17 1 how we're going to select the jury for the case that I am
11:05:20 2 presiding over. With your cooperation, we expect this
11:05:24 3 process to be done before lunchtime. And I will explain
11:05:28 4 further in just a moment, but the next step is for my
11:05:32 5 courtroom deputy, Ms. Garfinkel, to administer an oath.

11:05:36 6 Please proceed.

11:05:38 7 COURTROOM DEPUTY: Members of the jury panel,
11:05:41 8 will you please rise and raise your right hand. You and
11:05:48 9 each of you do solemnly swear, those of you who swear, and
11:05:52 10 you and each of you do affirm, those of you who affirm, that
11:05:55 11 you will true answer make to such questions as may be asked
11:05:58 12 you touching the matter now before the Court, so help you
11:06:01 13 God, those of you who swear, and you do so affirm, those of
11:06:05 14 you who affirm.

11:06:07 15 The proper response is I do.

11:06:09 16 JURY PANEL: I do.

11:06:10 17 COURTROOM DEPUTY: Thank you. You may be
11:06:13 18 seated.

11:06:13 19 THE COURT: So I think you should have all been
11:06:15 20 handed a copy of the document entitled Voir Dire. I am
11:06:18 21 going to read that document now. If you like, you can just
11:06:21 22 listen to me read it or if you want, you can follow along,
11:06:23 23 whichever way you learn best.

11:06:24 24 Good morning, ladies and gentlemen. I am Judge
11:06:27 25 Hall. We are going to select a jury in a civil case called

Gerald Szubielski versus David Pierce.

This is a case arising under the First Amendment of the Constitution of the United States alleging that Defendant David Pierce retaliated against Plaintiff Gerard Szubielski for participating in a lawsuit against James T. Vaughn Correctional Center while Plaintiff Szubielski was an inmate there and Defendant Pierce was the Warden.

Those of you selected to serve as jurors will receive more detailed instructions once you are sworn in as jurors and again at the conclusion of the trial.

The trial will begin tomorrow morning and is expected to take up to two-and-a-half business days to try, meaning we expect to be completed no later than Monday afternoon. Jury deliberations could extend your service beyond that. The schedule that I expect to keep over the days of evidence presentation will include a morning break of fifteen minutes, a lunch break of one hour, and an afternoon break of fifteen minutes. We will start at 9:30 a.m. and finish no later than 5:00 p.m. each day.

In light of this brief summary, I will ask you certain questions, the purpose of which is to (1) enable the Court to determine whether or not any prospective juror should be excused for cause; and (2) enable counsel for the parties to exercise their individual judgment with respect to preemptory challenges, that is, challenges for which no

reason need be given by counsel.

All of the questions I am about to read to you are stated in a "yes/no" format. It is not necessary at this time for you to respond to my questions in any way as I read them. If you have a "yes" answer to any of my questions, I ask that you either remember for which questions you have a "yes" answer or use the pen provided to keep track.

At that point I will move to the jury room, along with some of the lawyers and the court reporter. Meanwhile, my deputy will move among the prospective jurors in the courtroom and ask them if they had a "yes" answer to any of my questions. A juror may be brought into the jury room to talk to me and the lawyers. After we speak with you, my deputy or I will then tell you whether to go back to the benches. Once we are done speaking to as many jurors as necessary, I will explain the remaining steps of the jury selection process.

The questions are as follows:

1. Does the length of this trial or the schedule contemplated by the court present a special problem for you?

2. Do you have any special disability or problem that would make serving as a member of the jury difficult or impossible?

11:09:46 1 3. Have you or any member of your immediate
11:09:51 2 family (spouse, child, parent or sibling) ever been employed
11:10:00 3 by the Delaware Department of Correction?

11:10:02 4 4. Have you or any member of your immediate
11:10:04 5 family ever been incarcerated at the James T. Vaughn
11:10:12 6 Correctional Center?

11:10:12 7 5. Do you have any prior experience as a
11:10:16 8 correctional officer or working in a prison?

11:10:19 9 6. Have you had any experience with the
11:10:21 10 Delaware Department of Correction or any relationships with
11:10:25 11 Delaware Department of Correction employees or inmates that
11:10:28 12 would make it difficult for you to be a fair and impartial
11:10:32 13 juror in this case?

11:10:34 14 7. Do you or any member of your immediate
11:10:37 15 family have experience as a law enforcement officer?

11:10:41 16 8. I'll now ask the lawyers to stand and face
11:10:45 17 the venire while I tell you who the lawyers are and who they
11:10:50 18 are associated with.

11:10:51 19 For plaintiff we have:

11:10:54 20 Courtney A. Munnings - Troutman Pepper Hamilton
11:11:02 21 Sanders LLP.

11:11:03 22 Karli E. Cozen - Troutman Pepper Hamilton
11:11:10 23 Sanders LLP.

11:11:12 24 Also representing plaintiff are Nicole Crossey,
11:11:17 25 Joanna Cline, and Laurence Shiekman of Troutman Pepper

Hamilton Sanders LLP, who will be assisting at trial, and Michael Biek who will be assisting today.

For defendant we have:

Kenneth Wan - Department of Justice for the State of Delaware.

Allison McCowan - Department of Justice for the State of Delaware.

Rebecca Song - Department of Justice for the State of Delaware.

Do you or any of your immediate family know of any of the attorneys or the law firm that has just been named, or, have you or your immediate family had any business dealings with, or been employed by, any of these attorneys or their law firms or the Delaware Department of Justice?

9. Have you heard or read anything about this case?

10. Do you know Mr. Szubielski or Mr. Pierce?

11. Even if you do not personally know Mr. Szubielski or Mr. Pierce, have you heard anything about them that might make it difficult for you to be a fair and impartial juror in this case?

12. The potential witnesses in this case are:

Gerard Szubielski.

David Pierce.

11:12:45 1 Carla Miller.

11:12:47 2 James Scarborough.

11:12:49 3 Shane Troxler.

11:12:52 4 Awele Maduka-Ezeh.

11:12:56 5 Aileen Fink.

11:12:58 6 Michelle Roberts.

11:13:00 7 Philip Parker.

11:13:02 8 Are you familiar with any of these potential
11:13:05 9 witnesses?

11:13:06 10 13. As I mentioned before, Mr. Szubielski
11:13:09 11 claims that Mr. Pierce retaliated against him because of
11:13:13 12 Mr. Szubielski's involvement in an earlier lawsuit brought
11:13:18 13 by the American Civil Liberties Union (ACLU) and the
11:13:23 14 Delaware Community Legal Aid Society (CLASI). Do you have a
11:13:31 15 strong opinion, positive or negative, about the ACLU or
11:13:36 16 CLASI?

11:13:38 17 14. If you find that Mr. Pierce violated
11:13:41 18 Mr. Szubielski's constitutional rights, would you have any
11:13:44 19 difficulty in awarding money damages to compensate
11:13:48 20 Mr. Szubielski?

11:13:50 21 15. Have you ever served as a juror in a case
11:13:54 22 within the last fifteen years or so?

11:13:57 23 16. Do you have any prior experience with
11:14:00 24 litigation that might make it difficult for you to be a fair
11:14:04 25 and impartial juror in this case?

11:14:07 1 17. If you are selected to sit as a juror in
11:14:11 2 this case, are you aware of any reason why you would be
11:14:15 3 unable to render a verdict based solely on the evidence
11:14:19 4 presented at trial?

11:14:21 5 18. If you are selected to sit as a juror in
11:14:25 6 this case, are you aware of any reason why you would not be
11:14:29 7 able to follow the law as I give it to you?

11:14:34 8 This is the last question.

11:14:38 9 19. Is there anything else, including something
11:14:41 10 you have remembered in connection with one of the earlier
11:14:45 11 questions, that you think you would like to tell me in
11:14:51 12 connection with your service as a juror in this case?

11:14:54 13 Those are all the questions. As I mentioned, at
11:15:10 14 this time I am going to move into the jury room with some of
11:15:14 15 the attorneys for the case and we may ask some of you to
11:15:20 16 come back into the jury room to talk to you about your
11:15:23 17 answers to the questions.

11:15:31 18 COURTROOM DEPUTY: All rise.

12:43:35 19 (Jury room voir dire questioning:)

12:43:35 20 THE COURT: So we're now in the jury room ready
12:43:35 21 to do the follow-up voir dire questioning. So the way this
12:43:35 22 is going to work again is that Ms. Garfinkel is going to
12:43:35 23 bring in the jurors one at a time. They're going to stand
12:43:35 24 out in the hall while she comes in and tells us the name of
12:43:35 25 the juror we have and which question they answered yes to.

12:43:35 1 Is that how we're going to do it?

12:43:35 2 COURTROOM DEPUTY: Yes.

12:43:35 3 THE COURT: Let's do it that way and then if
12:43:35 4 there is also an issue that may have come up on their Covid
12:43:35 5 questionnaire we can catch, we'll deal with that as well.

12:43:35 6 COURTROOM DEPUTY: Your Honor, we have juror
12:43:35 7 number 2, Matthew Presley. Answered yes to questions 1, 4
12:43:35 8 and 8.

12:43:35 9 THE COURT: Ms. Garfinkel, did we lose juror
12:43:35 10 number 1?

12:43:35 11 COURTROOM DEPUTY: She didn't have any yes
12:43:35 12 responses and there was nothing on the questionnaire that I
12:43:35 13 noticed.

12:43:35 14 THE COURT: Should we let who them know juror
12:43:35 15 number 1 is at this point?

12:43:35 16 COURTROOM DEPUTY: I can.

12:43:35 17 THE COURT: I think we should.

12:43:35 18 COURTROOM DEPUTY: Juror number 1 is Carla
12:43:35 19 Cubbage.

12:43:35 20 THE COURT: Okay. Are we ready to bring in
12:43:35 21 juror number 2?

12:43:35 22 (Juror entering the room.)

12:43:35 23 THE COURT: We'll have you stand outside just
12:43:35 24 for a second, sir. I apologize.

12:43:35 25 MS. MUNNINGS: So I have a question about

12:43:36 1 whether we -- when there are no yeses, whether we follow-up
12:43:36 2 about any --

12:43:36 3 THE COURT: So if we have no yes answers to the
12:43:36 4 voir dire, that's going to be the first member of our group
12:43:36 5 of 14. So we have Ms. Cubbage as juror number 1, so once we
12:43:36 6 get to 14 that either have no yes answers or that have yes
12:43:36 7 answers but are not excused for cause, then we'll stop.

12:43:36 8 MS. MUNNINGS: So occupations are empty on here.
12:43:36 9 Do we get to talk to them about that, or no?

12:43:36 10 THE COURT: That's not traditionally how we do
12:43:36 11 it.

12:43:36 12 MS. MUNNINGS: Okay. Thank you, Your Honor.

12:43:36 13 (Juror entering the room.)

12:43:36 14 THE COURT: Thanks for your patience.

12:43:36 15 A JUROR: No problem.

12:43:36 16 THE COURT: You are juror number 2?

12:43:36 17 A JUROR: Correct.

12:43:36 18 THE COURT: That makes you Mr. Presley.

12:43:36 19 A JUROR: Yes, I am.

12:43:36 20 THE COURT: Thank you for coming in today, sir.
12:43:36 21 I understand that you answered yes to question number one
12:43:36 22 which ask about the length of the trial, that's going to be
12:43:36 23 a special problem for you. Could you tell us a little more
12:43:36 24 about that.

12:43:36 25 A JUROR: It has to do with my work. I'm the

12:43:36 1 only one capable of my job at work. I work at the DuPont
12:43:36 2 administration.

12:43:36 3 THE COURT: Does your employer know you are here
12:43:36 4 today?

12:43:36 5 A JUROR: Yes.

12:43:36 6 THE COURT: Have they expressed a reluctance to
12:43:36 7 let you serve as a juror?

12:43:36 8 A JUROR: No, they said go, provide proof that
12:43:36 9 you did it, that's all.

12:43:36 10 THE COURT: So is it going to be a hardship for
12:43:36 11 you or for your employer to be here?

12:43:36 12 A JUROR: Both.

12:43:36 13 THE COURT: Why would it be a hardship for you,
12:43:36 14 sir?

12:43:36 15 A JUROR: I work nights, I have been up since
12:43:36 16 11 o'clock last night and I'm fading pretty hard just to be
12:43:36 17 honest with you.

12:43:36 18 THE COURT: I'm going to ask to you step
12:43:36 19 outside.

12:43:36 20 (Juror left the jury room.)

12:43:36 21 THE COURT: So folks, I am inclined to let this
12:43:36 22 juror go for cause. I tend to not seat jurors who work
12:43:36 23 nights. I think it is challenging for them to listen to the
12:43:36 24 testimony.

12:43:36 25 Is there any objection to that from the

12:43:36 1 plaintiff?

12:43:36 2 MS. MUNNINGS: No.

12:43:36 3 THE COURT: Any objection?

12:43:36 4 MR. WAN: No, Your Honor.

12:43:36 5 THE COURT: Juror number 2 may be excused for
12:43:36 6 cause.

12:43:36 7 COURTROOM DEPUTY: Your Honor, may I have him
12:43:36 8 leave the courtroom?

12:43:36 9 THE COURT: Yes. Let him out the back way.
12:43:36 10 Thank you. So normally you would know which jurors had no
12:43:36 11 yeses because you would have seen them all get drawn, but
12:43:36 12 because we're doing this a little bit different today with
12:43:36 13 the random number generator, we'll let you know which jurors
12:43:36 14 don't have the yes answers so you can know where we are in
12:43:36 15 terms of filling out the box.

12:43:36 16 COURTROOM DEPUTY: Ready for the next juror?

12:43:36 17 THE COURT: Yes.

12:43:36 18 I can tell you the next person she's talking to
12:43:36 19 is juror number 3, Amy Tracy.

12:43:36 20 COURTROOM DEPUTY: We have juror number 3, Amy
12:43:36 21 Tracy, responded yes to questions 3 and 6.

12:43:36 22 (Juror entering the room.)

12:43:36 23 THE COURT: Please have a seat. You're juror
12:43:36 24 number 3, is that right?

12:43:36 25 A JUROR: Yes.

12:43:37 1 THE COURT: That makes you Amy Tracy; is that
12:43:37 2 right?

12:43:37 3 A JUROR: Yes.

12:43:37 4 THE COURT: I understand you answered yes to
12:43:37 5 question number 3 which ask have you or any member of your
12:43:37 6 immediate family ever been employed by the Delaware
12:43:37 7 Department of Corrections. Can you tell us about that?

12:43:37 8 A JUROR: I answered 6 because 6 related to, I
12:43:37 9 have a brother-in-law and nephew who both work for the
12:43:37 10 Department of Corrections.

12:43:37 11 THE COURT: Do they both work at the prison?

12:43:37 12 A JUROR: One works up here and the other works
12:43:37 13 in Smyrna, not inside, he was outside, and --

12:43:37 14 THE COURT: Okay. So the brother-in-law that
12:43:37 15 works in Smyrna doesn't work with any of the prisoners who
12:43:37 16 are in the secured facility?

12:43:37 17 A JUROR: No.

12:43:37 18 THE COURT: Do you have a relationship with your
12:43:37 19 family members who work for the Department of Correction and
12:43:37 20 in your view affect your ability to be a fair and impartial
12:43:37 21 juror in this case?

12:43:37 22 A JUROR: I'm not sure.

12:43:37 23 THE COURT: What do you mean by that?

12:43:37 24 A JUROR: I mean, I don't think so.

12:43:37 25 THE COURT: You don't think so?

12:43:37 1

A JUROR: No.

12:43:37 2

THE COURT: Okay. Let me have questions from

12:43:37 3

counsel for the plaintiff, if you have any.

12:43:37 4

MS. COZEN: Do either of your relatives interact

12:43:37 5

with prison administration at all?

12:43:37 6

A JUROR: I don't know.

12:43:37 7

MS. COZEN: Or inmates at all?

12:43:37 8

A JUROR: I believe so.

12:43:37 9

MS. COZEN: Do they feel positively about their

12:43:37 10

jobs?

12:43:37 11

A JUROR: Yes, they don't really talk about

12:43:37 12

their jobs.

12:43:37 13

MS. COZEN: Would it be difficult for you to

12:43:37 14

find a verdict against the DOC or someone who works at the

12:43:37 15

DOC?

12:43:37 16

A JUROR: If the evidence shows that that's what

12:43:37 17

it would be.

12:43:37 18

MS. COZEN: No other questions, Your Honor.

12:43:37 19

THE COURT: Okay.

12:43:37 20

MR. WAN: Good morning, Ms. Tracy. I know you

12:43:37 21

say you don't talk much, but do they tell you, your

12:43:37 22

brother-in-law or nephew, do they tell you any stories about

12:43:37 23

their work or anything like that?

12:43:37 24

A JUROR: No.

12:43:37 25

MR. WAN: Would they ever speak with any

12:43:37 1 specific inmates or anything like that?

12:43:37 2 A JUROR: No.

12:43:37 3 MR. WAN: Okay.

12:43:37 4 THE COURT: We'll have you step outside for a
12:43:37 5 minute, ma'am.

12:43:37 6 (Juror leaving the room.)

12:43:37 7 THE COURT: Any applications?

12:43:37 8 MS. COZEN: No, Your Honor.

12:43:38 9 MR. WAN: No, Your Honor.

12:43:38 10 MS. COZEN: Your Honor, would Amy Tracy be
12:43:38 11 number 2?

12:43:38 12 THE COURT: Number 2. And we'll go until we get
12:43:38 13 to number 14.

12:43:38 14 COURTROOM DEPUTY: Your Honor, I have juror
12:43:38 15 number 4, Michael Whittaker. Possible yes answer to 1, 7,
12:43:38 16 and 15.

12:43:38 17 THE COURT: Okay.

12:43:38 18 (Juror entering the room.)

12:43:38 19 THE COURT: Please have a seat, sir. You are
12:43:39 20 juror number 4; is that right.

12:43:39 21 A JUROR: That's right.

12:43:39 22 THE COURT: That would make you Mr. Whittaker?

12:43:39 23 A JUROR: Yes, ma'am.

12:43:39 24 THE COURT: I understand you had a yes answer to
12:43:39 25 question number 1 which asked if the length of the trial or

12:43:38 1 the schedule presented a special problem for you.

12:43:38 2 A JUROR: I said that was a possible yes, yes.

12:43:38 3 THE COURT: Can you tell us about that.

12:43:38 4 A JUROR: Sure. I have a lot going on at work.

12:43:38 5 My children -- I have been divorced about a year. My
12:43:38 6 children come back to me Friday morning which normally
12:43:38 7 wouldn't be an issue, but my son, who is sixteen, would
12:43:38 8 normally be there to watch her, but his birthday is Thursday
12:43:38 9 so he's going to be golfing, so I have a ten-year old that I
12:43:38 10 need child care for. My normal baby-sitter is unfortunately
12:43:38 11 in the hospital. Just a lot.

12:43:38 12 THE COURT: Sorry to hear that. So if we went
12:43:38 13 on Friday, that would be an issue.

12:43:38 14 Let's talk to you about question number 7 which
12:43:38 15 asked if you or any member of your immediate family have
12:43:38 16 experiences with law enforcement officer.

12:43:38 17 A JUROR: My sister is an FBI agent.

12:43:38 18 THE COURT: Is that here in Delaware.

12:43:38 19 A JUROR: No, she lives in Miami now. Well,
12:43:38 20 north of Miami.

12:43:38 21 THE COURT: Does your relationship with your
12:43:38 22 sister as a law enforcement agent in your mind make it so
12:43:38 23 that you would be unable to render a fair and impartial
12:43:38 24 verdict in the case?

12:43:38 25 A JUROR: No, not at all.

12:43:38 1 THE COURT: Okay. And let me ask you about
12:43:38 2 question number 15. Have you ever served as a juror in a
12:43:38 3 case within the last fifteen years or so?

12:43:38 4 A JUROR: Yeah, I think that's technically
12:43:38 5 correct. I was selected as a juror. It's probably been
12:43:38 6 three years, state court. And we sat as a jury but the
12:43:38 7 first morning of trial they settled. It was done at that
12:43:38 8 point. We were sworn in and everything.

12:43:38 9 THE COURT: You didn't actually deliberate in
12:43:38 10 that case?

12:43:38 11 A JUROR: Right.

12:43:38 12 THE COURT: I'm going to ask you to step outside
12:43:38 13 for just a minute and if we have some more questions we'll
12:43:38 14 bring you back in.

12:43:38 15 (Juror leaving the room.)

12:43:38 16 THE COURT: So I am inclined to excuse this
12:43:38 17 juror because of his child care issues, but if you like or
12:43:38 18 if someone objects, we can bring him back to question him
12:43:38 19 further. I'll give you a minute.

12:43:38 20 MS. MUNNINGS: We would object.

12:43:38 21 THE COURT: You do object?

12:43:38 22 MR. WAN: We didn't.

12:43:38 23 THE COURT: Let's bring him back for some
12:43:38 24 further questions. Thank you.

12:43:38 25 (Juror entering the room.)

12:43:39 1 I'm going to give the parties a chance to ask
12:43:39 2 you some further questions. We'll start with counsel for
12:43:39 3 plaintiff.

12:43:39 4 MS. MUNNINGS: So was the child care issue, is
12:43:39 5 it likely that you would be able to find someone?

12:43:39 6 A JUROR: I can certainly ask my ex-wife if she
12:43:39 7 can keep my daughter on Friday. I prefer not to do that,
12:43:39 8 but if I have to do that, I can do that.

12:43:39 9 THE COURT: Any other questions?

12:43:39 10 MS. MUNNINGS: No.

12:43:39 11 THE COURT: Any questions from counsel for the
12:43:39 12 defendant?

12:43:39 13 MR. WAN: No.

12:43:39 14 THE COURT: We'll have you step outside for one
12:43:39 15 more minute, sir. Thank you.

12:43:39 16 (Juror leaving the room.)

12:43:39 17 THE COURT: Any applications?

12:43:39 18 We'll seat this as juror number 3 since he did
12:43:39 19 indicate in follow-up questioning that it would be possible
12:43:39 20 for him to serve.

12:43:39 21 The next juror on the list that I believe
12:43:39 22 Ms. Garfinkel will be talking to is Michelle D. Crocker.

12:43:39 23 COURTROOM DEPUTY: The next juror is juror
12:43:39 24 number 6. First name Venkatesan, last name Ranganathan.

12:43:39 25 THE COURT: Just for purposes of the record,

12:43:39 1 juror number 5 was Michelle D. Crocker; is that right?

12:43:39 2 COURTROOM DEPUTY: Yes.

12:43:39 3 THE COURT: And there were no yes answers?

12:43:39 4 COURTROOM DEPUTY: Yes.

12:43:39 5 MR. WAN: Who is number 6 again?

12:43:39 6 COURTROOM DEPUTY: Last name Ranganathan,

12:43:39 7 R-A-N-G-A-N-A-T-H-A-N.

12:43:39 8 MR. WAN: Got you. Thank you.

12:43:39 9 COURTROOM DEPUTY: And responded yes to question

12:43:39 10 1?

12:43:39 11 THE COURT: One.

12:43:39 12 (Juror entering the room.)

12:43:39 13 THE COURT: Please have a seat. You are juror
12:43:39 14 number 6; is that right?

12:43:39 15 A JUROR: Yes.

12:43:39 16 THE COURT: That would make you Mr. Ranganathan?

12:43:39 17 A JUROR: Right.

12:43:39 18 THE COURT: Did I say that right?

12:43:39 19 A JUROR: Close.

12:43:39 20 THE COURT: You answered yes to question 1; is
12:43:39 21 that right?

12:43:39 22 A JUROR: Yes.

12:43:39 23 THE COURT: And that ask if the length of the
12:43:39 24 trial or the schedule presented a special problem for you.
12:43:39 25 Could you tell us about that.

12:43:39 1 A JUROR: Yes. So the deliberation part, the
12:43:39 2 length of trial is fine, I can do that, but I got a couple
12:43:39 3 of things, the work schedule will not allow me for extended
12:43:40 4 periods of time. I have a family coming the week after
12:43:40 5 next. And then the third aspect is I have been found I am a
12:43:40 6 match for a stem cell donor, so that potentially the testing
12:43:40 7 will start next week for that. I was wondering if the
12:43:40 8 deliberations are going to take more than a couple of hours
12:43:40 9 or something like that, or more than a couple of days, that
12:43:40 10 might get pushed out, and if they found the donor, it's
12:43:40 11 actually very important. So it's really not the length of
12:43:40 12 trial itself, up to Monday is fine, but the deliberations
12:43:40 13 will probably be a problem.

12:43:40 14 THE COURT: So do you have a sense of when you
12:43:40 15 might get called for the donation?

12:43:40 16 A JUROR: We have a meeting today, this evening,
12:43:40 17 I would know more about that, but potentially sometime next
12:43:40 18 week, midweek.

12:43:40 19 THE COURT: Midweek. And would they let you
12:43:40 20 know the night before or could you be potentially called in
12:43:40 21 the middle to rush over?

12:43:40 22 A JUROR: I think they would probably let me
12:43:40 23 know the day earlier.

12:43:40 24 THE COURT: And then you had family coming the
12:43:40 25 week after next week; is that right?

12:43:40 1 A JUROR: Yes.

12:43:40 2 THE COURT: And you also mentioned a work issue?

12:43:40 3 A JUROR: Yes.

12:43:40 4 THE COURT: What do you do for a living?

12:43:40 5 A JUROR: I work for TD Bank in their computer

12:43:40 6 department, so getting out for extended periods is a

12:43:40 7 problem.

12:43:40 8 THE COURT: It wouldn't be good for your

12:43:40 9 employer?

12:43:40 10 A JUROR: Yes.

12:43:40 11 THE COURT: Any questions from counsel for

12:43:40 12 plaintiff?

12:43:40 13 MS. COZEN: Does your employer know you're here

12:43:40 14 today?

12:43:40 15 A JUROR: Yes.

12:43:40 16 MS. COZEN: And they're okay with it?

12:43:40 17 No additional questions from plaintiff.

12:43:40 18 THE COURT: Any questions from the defendant?

12:43:40 19 MR. WAN: No, Your Honor.

12:43:40 20 THE COURT: We're going to ask you, sir, just to

12:43:40 21 stand out in the hall just for a minute.

12:43:40 22 A JUROR: Sure.

12:43:40 23 THE COURT: Thank you.

12:43:40 24 (Juror leaving the room.)

12:43:40 25 THE COURT: Any applications?

12:43:40 1 MS. COZEN: No, Your Honor.

12:43:40 2 MR. WAN: No, Your Honor.

12:43:40 3 THE COURT: So this juror expressed a concern if
12:43:40 4 the deliberations would be lengthy. It sounds like he's
12:43:40 5 worried if they were to go for more than a day or so, which
12:43:40 6 I don't think we're anticipating happening. I also think if
12:43:40 7 we lost him, we would still have a full panel. So I am
12:43:40 8 inclined to not excuse this juror. I didn't see any undue
12:43:40 9 hardship here within the meaning of the rule. So we'll have
12:43:40 10 that juror put as number 5.

12:43:40 11 The next person I have on my list is Vera Brown.
12:43:40 12 It should be juror number 7.

12:43:40 13 COURTROOM DEPUTY: Your Honor, juror number 7,
12:43:40 14 Vera Brown has no yes responses.

12:43:40 15 Juror number 8, Tyler, I'll spell the last name,
12:43:40 16 P-H-O-M-M-A-C-H-A-N-H, also had all no responses.

12:43:40 17 And juror number 9, Catherine Fridell, no
12:43:40 18 responses.

12:43:40 19 MS. COZEN: I'm sorry, could you repeat that
12:43:40 20 name?

12:43:40 21 COURTROOM DEPUTY: Catherine Fridell,
12:43:40 22 F-R-I-D-E-L-L.

12:43:40 23 MS. COZEN: Thank you.

12:43:40 24 THE COURT: By my count, that makes eight so
12:43:40 25 far.

12:43:41 1 COURTROOM DEPUTY: Correct, Your Honor.

12:43:41 2 We have juror number 10 outside, Valerie Hogan.
12:43:41 3 Yes responses to questions 2, 4, 17, and there are also some
12:43:41 4 concerns on her Covid questionnaire.

12:43:41 5 THE COURT: Do you have a copy of that?

12:43:41 6 COURTROOM DEPUTY: Yes, I do.

12:43:41 7 THE COURT: So I'll let the attorneys know that
12:43:41 8 we did receive a Covid questionnaire from this juror. She
12:43:41 9 hasn't been exposed. She doesn't have any symptoms. She
12:43:41 10 has received her Covid vaccination. But she does have a
12:43:41 11 concern about being around others who may not be vaccinated
12:43:41 12 but do not wear a mask. And I think that's a concern that
12:43:41 13 many still share. That's not an unreasonable concern. She
12:43:41 14 also indicates that she has an elderly father and doesn't
12:43:41 15 want to take chances on giving him anything, so if you have
12:43:41 16 any questions about that, I can explore with her a bit if
12:43:41 17 she has issues about not wearing masks if everyone around
12:43:41 18 her is vaccinated.

12:43:41 19 COURTROOM DEPUTY: May I bring her in, Your
12:43:41 20 Honor?

12:43:41 21 THE COURT: Yes.

12:43:41 22 (Juror entering the room.)

12:43:41 23 THE COURT: You are juror number 10; is that
12:43:41 24 right?

12:43:41 25 A JUROR: Yes.

12:43:41 1 THE COURT: That would make you Ms. Hogan.

12:43:41 2 A JUROR: Yes.

12:43:41 3 THE COURT: Ma'am, I am vaccinated just so you
12:43:41 4 know and I have been for a long time.

12:43:41 5 A JUROR: Okay.

12:43:41 6 THE COURT: And I'll stay away as well.

12:43:41 7 So you answered yes to question number 2 that
12:43:41 8 asked if you had a special disability or problem that would
12:43:41 9 make serving as a member of the jury difficult or
12:43:41 10 impossible.

12:43:41 11 A JUROR: Yeah. It's not a disability, but it
12:43:41 12 is a problem. I have been working graveyard shift for
12:43:41 13 almost twenty years now, and I don't function well during
12:43:41 14 the day.

12:43:41 15 THE COURT: Yes.

12:43:41 16 A JUROR: You know, I just really don't. I
12:43:41 17 don't feel that I would be able to, you know, be able to
12:43:41 18 concentrate on what's going on.

12:43:41 19 THE COURT: Yeah. Did you have to work last
12:43:41 20 night?

12:43:41 21 A JUROR: No, I didn't. But I couldn't sleep
12:43:41 22 last night.

12:43:41 23 THE COURT: Right.

12:43:41 24 A JUROR: I went to bed like 4 o'clock.

12:43:41 25 THE COURT: When is your next shift scheduled to

12:43:41 1 occur?

12:43:41 2 A JUROR: Actually if I get out before 12:00

12:43:42 3 today, I have to go in tonight.

12:43:42 4 THE COURT: Okay. I'm going to ask you to step
12:43:42 5 outside just for a minute. Thank you.

12:43:42 6 A JUROR: Okay.

12:43:42 7 (Juror leaving the room.)

12:43:42 8 THE COURT: Similar to the juror we excused
12:43:42 9 before, I am inclined to excuse jurors for cause who work
12:43:42 10 nightshift. Is there any objection to that or do we want to
12:43:42 11 have more follow-up questions?

12:43:42 12 MS. MUNNINGS: No objection.

12:43:42 13 MR. WAN: No, Your Honor.

12:43:42 14 THE COURT: This juror can be excused for cause.
12:43:42 15 Thank you.

12:43:42 16 COURTROOM DEPUTY: Your Honor, I have juror
12:43:42 17 number 11, Griffin John, yes response to question number 6.

12:43:42 18 THE COURT: Okay.

12:43:42 19 (Juror entering the room.)

12:43:42 20 THE COURT: Please have a seat, sir. You're
12:43:42 21 juror 11; is that right?

12:43:42 22 A JUROR: Yes.

12:43:42 23 THE COURT: And that makes you Mr. John; is that
12:43:42 24 right?

12:43:42 25 A JUROR: Yes.

12:43:42 1 THE COURT: Okay. So I understand from
12:43:42 2 Ms. Garfinkel that you answered yes to question number 6
12:43:42 3 which asked whether or not you have had any experiences with
12:43:42 4 the Delaware Department of Correction or any relationships
12:43:42 5 with Delaware Department of Correction employees or inmates
12:43:42 6 that would make it difficult for you to be a fair and
12:43:42 7 impartial juror in this case.

12:43:42 8 Can you tell us a little bit more?

12:43:42 9 A JUROR: Yes. So I work in Delaware Air
12:43:42 10 National Guard from 2009 to 2015 of which two of the
12:43:42 11 coworkers work in Delaware Correctional Center, and they
12:43:42 12 told me stories about the inmates there. It's just that --
12:43:42 13 I'm just letting you know that I heard stories about it. So
12:43:42 14 unless I hear the case, I won't be making any judgment on
12:43:42 15 that, but I'm just letting you know.

12:43:42 16 THE COURT: Do you know which prison your
12:43:42 17 coworkers worked at?

12:43:42 18 A JUROR: It's been a while, I don't remember,
12:43:42 19 but I know they worked in the correction center.

12:43:42 20 THE COURT: Do you think if I instructed you to
12:43:42 21 put aside those stories and just render a verdict based on
12:43:42 22 the evidence in this case that you would be able to do that?

12:43:42 23 A JUROR: I sure do.

12:43:42 24 THE COURT: All right. Questions?

12:43:42 25 MS. COZEN: Did the stories portray the inmates

12:43:42 1 in a negative light?

12:43:42 2 A JUROR: It did.

12:43:42 3 MS. COZEN: And has that impacted your view of
12:43:42 4 inmates or prisoners in Delaware?

12:43:42 5 A JUROR: I never been to the correction center,
12:43:42 6 so the things I heard is from my coworkers telling about it,
12:43:42 7 so that's my viewpoint about it. But I never been to any
12:43:42 8 correction center myself to hear any other stories.

12:43:42 9 MS. COZEN: So that's all you have to base your
12:43:42 10 view?

12:43:42 11 A JUROR: Yes, that's all.

12:43:42 12 MS. COZEN: Okay.

12:43:42 13 THE COURT: Anymore questions?

12:43:42 14 MS. COZEN: No further questions.

12:43:42 15 THE COURT: Any questions?

12:43:42 16 MR. WAN: What stories did they tell you?

12:43:42 17 A JUROR: About them trying to escape and trying
12:43:42 18 to attack them while they're trying to escape.

12:43:42 19 MR. WAN: And that doesn't affect your ability
12:43:42 20 to be impartial in this case?

12:43:42 21 A JUROR: I hope not.

12:43:42 22 MR. WAN: Okay.

12:43:42 23 THE COURT: We'll have you stand outside for
12:43:42 24 just a minute.

12:43:42 25 A JUROR: All right.

12:43:43 1 (Juror leaving the room.)

12:43:43 2 THE COURT: My application.

12:43:43 3 MS. COZEN: Your Honor, we would move to strike
12:43:43 4 for cause. This juror said that the only impressions he has
12:43:43 5 about the Delaware Department of Corrections are what he
12:43:43 6 heard from his friends and the fact that he hopes for it not
12:43:43 7 to affect of his opinion is not sufficient for us to have
12:43:43 8 him. We think that would be bias against our client and
12:43:43 9 very prejudicial.

12:43:43 10 THE COURT: Mr. Wan?

12:43:43 11 MR. WAN: He said he could be impartial. When
12:43:43 12 you asked him what you asked him, he said it won't affect
12:43:43 13 his ability to render a fair verdict. I think he is okay.

12:43:43 14 THE COURT: He did indicate he thought he could
12:43:43 15 be impartial, but I am troubled by the fact that he answered
12:43:43 16 yes to a question that it would be difficult for him to be
12:43:43 17 fair and impartial. Based on that, we're going to strike
12:43:43 18 juror number 11 for cause.

12:43:43 19 MR. WAN: Your Honor, when they're seated, do
12:43:43 20 they change juror numbers or they're wearing the one that
12:43:43 21 was initially assigned?

12:43:43 22 THE COURT: They are wearing the one they were
12:43:43 23 initially assigned. We're going to keep these juror numbers
12:43:43 24 and then we will renumber them once we get to our eight, if
12:43:43 25 that makes sense.

12:43:43 1 MR. WAN: Got you.

12:43:43 2 THE COURT: I have next to my list James Robert
12:43:43 3 Matthews.

12:43:43 4 MR. WAN: Number 12, Your Honor?

12:43:43 5 THE COURT: Yes.

12:43:43 6 COURTROOM DEPUTY: Your Honor, I have juror
12:43:43 7 number 12, James Matthews, responded yes to questions 1, 2
12:43:43 8 and 7.

12:43:43 9 THE COURT: Okay. Thank you.

12:43:43 10 (Juror entering the room.)

12:43:43 11 THE COURT: Good morning, sir.

12:43:43 12 A JUROR: Good morning.

12:43:43 13 THE COURT: Please have a seat right here. You
12:43:43 14 are Juror 12; is that right?

12:43:43 15 A JUROR: Yes.

12:43:43 16 THE COURT: And that would make you
12:43:43 17 Mr. Matthews; is that right?

12:43:43 18 A JUROR: Yes.

12:43:43 19 THE COURT: I understand, sir, you answered yes
12:43:43 20 to question number 1 which ask if the length of the trial or
12:43:43 21 the schedule would be a problem for you. Can you tell us a
12:43:43 22 little bit about that?

12:43:43 23 A JUROR: I work for the hospital, Christiana.
12:43:43 24 Right now we're short staffed and I work third shift.

12:43:43 25 THE COURT: What hours is third shift?

12:43:43 1 A JUROR: 10 o'clock to 7:00.

12:43:43 2 THE COURT: You worked last night, sir?

12:43:43 3 A JUROR: I worked last night and tonight, too.

12:43:43 4 THE COURT: Very good. I'm going to ask you to
12:43:43 5 stand outside for a minute while I talk to the attorneys.

12:43:43 6 (Juror leaving the room.)

12:43:43 7 THE COURT: I am inclined to excuse this juror
12:43:43 8 for cause based on the fact that he worked third shift. Any
12:43:44 9 objections?

12:43:44 10 MR. WAN: No, Your Honor.

12:43:44 11 MS. MUNNINGS: No, Your Honor.

12:43:44 12 THE COURT: Thank you.

12:43:44 13 The next I have on my list is Juan Carlos
12:43:44 14 Cabrera.

12:43:44 15 COURTROOM DEPUTY: Juror number 13, Juan
12:43:44 16 Cabrera. No responses.

12:43:44 17 THE COURT: So that would make him nine on our
12:43:44 18 running total of fourteen.

12:43:44 19 COURTROOM DEPUTY: Correct, Your Honor.

12:43:44 20 And outside we have juror number 14, Tammy
12:43:44 21 Brown, responded yes to question number 4.

12:43:44 22 (Juror entering the room.)

12:43:44 23 THE COURT: Hi. Please have a seat. You are
12:43:44 24 juror number 14; is that right?

12:43:44 25 A JUROR: Yes.

12:43:44 1 THE COURT: That would make you Ms. Brown.

12:43:44 2 A JUROR: Yes.

12:43:44 3 THE COURT: I understand that you responded yes
12:43:44 4 to question number 4 which asked if you or any member of
12:43:44 5 your immediate family has ever been incarcerated at James T.
12:43:44 6 Vaughn Correctional Center.

12:43:44 7 A JUROR: Yes.

12:43:44 8 THE COURT: Can you tell us.

12:43:44 9 A JUROR: I have two half brothers. I haven't
12:43:44 10 spoke to him since my mother passed. Same mother, different
12:43:44 11 fathers. They both have been incarcerated many times. I
12:43:44 12 don't know if they have been at Vaughn. I am going to
12:43:44 13 assume they were since it's been so many times.

12:43:44 14 THE COURT: Does the fact that your half
12:43:44 15 brothers have been incarcerated in Delaware, do you think
12:43:44 16 that would make it difficult for you to be a fair and
12:43:44 17 impartial juror in this case?

12:43:44 18 A JUROR: No. No.

12:43:44 19 THE COURT: Any questions from counsel for
12:43:44 20 plaintiff?

12:43:44 21 MS. MUNNINGS: No, Your Honor.

12:43:44 22 THE COURT: Any questions?

12:43:44 23 MR. WAN: Ms. Brown, do you speak to your half
12:43:44 24 brothers often?

12:43:44 25 A JUROR: No, my mother has been gone seven

12:43:44 1 years. I did have an incident with my brother and I had to
12:43:44 2 come here and produce a victim statement. That was my last
12:43:44 3 contact with him. And he was incarcerated due to his
12:43:44 4 threats.

12:43:44 5 MR. WAN: Did they tell you about any of their
12:43:44 6 experiences while being incarcerated?

12:43:44 7 A JUROR: No, I don't talk to them.

12:43:44 8 THE COURT: We're going to have you stand
12:43:44 9 outside for just a moment. Thanks so much.

12:43:44 10 A JUROR: Thank you.

12:43:44 11 (Juror leaving the room.)

12:43:44 12 THE COURT: Any applications?

12:43:44 13 MS. MUNNINGS: No, Your Honor.

12:43:44 14 MR. WAN: No, Your Honor.

12:43:44 15 THE COURT: Okay. That makes ten so far.

12:43:44 16 COURTROOM DEPUTY: Judge, I have juror number
12:43:44 17 15, Yuan Liu and has yes answers to 1 and 19.

12:43:44 18 THE COURT: Thank you.

12:43:44 19 (Juror entering the room.)

12:43:44 20 THE COURT: Please have a seat. You are juror
12:43:44 21 number 15, sir, is that right?

12:43:44 22 A JUROR: Yes.

12:43:44 23 THE COURT: That makes you Mr. Liu.

12:43:44 24 A JUROR: Yes.

12:43:44 25 THE COURT: I understand that you answered yes

12:43:45 1 to question number 1 about the length of the trial or the
12:43:45 2 schedule presenting a problem for you.

12:43:45 3 A JUROR: Yes.

12:43:45 4 THE COURT: Could you tell us a little more
12:43:45 5 about that?

12:43:45 6 A JUROR: I wasn't sure about the wording on
12:43:45 7 special problems, but I'm attending the University of
12:43:45 8 Delaware summer classes and we have a final on Friday, so it
12:43:45 9 would be two to two-and-a-half business days, it's a
12:43:45 10 synchronous final, but I haven't gotten a response from my
12:43:45 11 professor yet, I don't know if he can reschedule it.

12:43:45 12 THE COURT: And I imagine that the term
12:43:45 13 synchronous final is a term that's unique to Covid and that
12:43:45 14 means you need to take it when everybody else takes it; is
12:43:45 15 that right?

12:43:45 16 A JUROR: I e-mailed him about a makeup, but he
12:43:45 17 hasn't gotten back to me.

12:43:45 18 THE COURT: Thank you. Sir, I'm going to ask
12:43:45 19 you to stand out in the hall for a minute.

12:43:45 20 (Juror leaving the room.)

12:43:45 21 THE COURT: I think in the jury plan we may
12:43:45 22 usually excuse students. I don't know how this one slipped
12:43:45 23 through, but does anyone have any objection if I excuse this
12:43:45 24 juror for cause?

12:43:45 25 MS. MUNNINGS: No, Your Honor.

12:43:45 1 MR. WAN: No.

12:43:45 2 THE COURT: Okay. We'll excuse Mr. Liu for
12:43:45 3 cause. Thank you.

12:43:45 4 The next one I have on my list is Luigi
12:43:45 5 Schiavoni.

12:43:45 6 MS. COZEN: Schiavoni.

12:43:45 7 THE COURT: S-C-H.

12:43:45 8 MS. COZEN: Thank you.

12:43:45 9 COURTROOM DEPUTY: Your Honor, we have juror
12:43:45 10 number 16, Luigi Schiavoni. And he doesn't necessarily have
12:43:45 11 a yes, just has a question that's related to his job.

12:43:45 12 (Juror entering the room.)

12:43:45 13 THE COURT: Good afternoon, sir.

12:43:45 14 A JUROR: Hello there.

12:43:45 15 THE COURT: Please have a seat. You're juror
12:43:45 16 number 16, is that right?

12:43:45 17 A JUROR: Yes.

12:43:45 18 THE COURT: That makes you Mr. Schiavoni.

12:43:45 19 A JUROR: Yes.

12:43:45 20 THE COURT: I understand you had a concern
12:43:45 21 related to your employment?

12:43:45 22 A JUROR: Yes. Everybody of course thinks
12:43:45 23 they're the most important person at their job. A couple
12:43:45 24 months ago the boss in front of me just quit, so then --
12:43:45 25 which is good, that gave me a lot of responsibilities and

12:43:45 1 stuff at work and I have a manager above me. Well, since
12:43:45 2 then about two weeks ago he got diagnosed with some heavy
12:43:45 3 medical stuff that he's getting to go to, that means I would
12:43:45 4 be the guy to ask.

12:43:45 5 THE COURT: What do you do?

12:43:45 6 A JUROR: I'm a mechanic. I'm foreman at Bay
12:43:45 7 Shore Ford.

12:43:45 8 THE COURT: What hours do you work?

12:43:46 9 A JUROR: I work in the morning from 6:00 in the
12:43:46 10 morning to 2:30 in the afternoon.

12:43:46 11 THE COURT: If your supervisor above you is out,
12:43:46 12 what would you be called on to do?

12:43:46 13 A JUROR: Either make a decision or go over to
12:43:46 14 the other shop because there is one or two shops to see what
12:43:46 15 is going on. Like this morning before I came here I went
12:43:46 16 and got a couple of guys started on their job, that's where
12:43:46 17 I went this morning before I came here, so I figured I would
12:43:46 18 ask. I got no problem with making a statement, whatever I
12:43:46 19 can do.

12:43:46 20 THE COURT: Is it a union shop, sir?

12:43:46 21 A JUROR: No.

12:43:46 22 THE COURT: So if your supervisor in front of
12:43:46 23 you is gone, you would just take over for him?

12:43:46 24 A JUROR: Not really take over. I can't say I
12:43:46 25 have that much authority, like I couldn't fire anybody or

12:43:46 1 that stuff. You know what I mean?

12:43:46 2 THE COURT: Do you have any reason to think that
12:43:46 3 he'll be out?

12:43:46 4 A JUROR: He has got cancer and it's pretty
12:43:46 5 aggressive. He started his first dose of chemo today.

12:43:46 6 THE COURT: Okay. Does your employer know
12:43:46 7 you're here today?

12:43:46 8 A JUROR: Yes.

12:43:46 9 THE COURT: Did they express any concern with
12:43:46 10 you --

12:43:46 11 A JUROR: She said Lou, we need you back as soon
12:43:46 12 as you can. I said, I got you. I'm with you guys. Would
12:43:46 13 the place close up tomorrow without me? No, just like every
12:43:46 14 place.

12:43:46 15 THE COURT: Any questions, counsel for the
12:43:46 16 plaintiff?

12:43:46 17 MS. MUNNINGS: No, Your Honor.

12:43:46 18 THE COURT: Any questions for counsel for the
12:43:46 19 defendant?

12:43:46 20 MR. WAN: No.

12:43:46 21 THE COURT: Thank you, sir. We're going to have
12:43:46 22 you stand out in the hall for just a minute.

12:43:46 23 A JUROR: Thank you.

12:43:46 24 (Juror leaving the room.)

12:43:46 25 THE COURT: Any application?

12:43:46 1 MS. MUNNINGS: No, Your Honor.

12:43:46 2 MR. WAN: No, Your Honor.

12:43:46 3 THE COURT: Okay. We'll have that be number 11.

12:43:46 4 COURTROOM DEPUTY: Your Honor, juror number 17,
12:43:46 5 Christopher Aitken, a yes response to one, and a possible
12:43:46 6 yes to seven.

12:43:46 7 THE COURT: Thank you.

12:43:46 8 (Juror entering the room.)

12:43:46 9 THE COURT: Good afternoon, sir. Please have a
12:43:46 10 seat right here.

12:43:46 11 A JUROR: Sure.

12:43:46 12 THE COURT: You are juror number 17; is that
12:43:46 13 right?

12:43:46 14 A JUROR: That is correct.

12:43:46 15 THE COURT: That would make you Mr. Aitken?

12:43:46 16 A JUROR: Yes.

12:43:46 17 THE COURT: You answered yes to question number
12:43:46 18 1, which asked if the length of the trial or the schedule
12:43:46 19 presented a problem for you.

12:43:46 20 A JUROR: Yes.

12:43:46 21 THE COURT: Can you tell us a little bit about
12:43:46 22 that.

12:43:46 23 A JUROR: For the summer I'm a stay-at-home
12:43:46 24 father of three young kids and so the thirteen-year old, but
12:43:46 25 more importantly two eleven-year old twins and one of them

12:43:47 1 has severe autism, so finding child care for the extended
12:43:47 2 amount of time is pretty difficult. During the school year
12:43:47 3 he goes to school, so that's not necessarily an issue during
12:43:47 4 the school year, but for the summer, I'm taking off this
12:43:47 5 summer and kind of at home with them.

12:43:47 6 THE COURT: Who is watching them right now?

12:43:47 7 A JUROR: So my wife took off today. So she is
12:43:47 8 a business owner. So she is off until probably 2:00,
12:43:47 9 3 o'clock or so today, then she'll go into her office.

12:43:47 10 THE COURT: Any questions from counsel?

12:43:47 11 MS. MUNNINGS: No, Your Honor.

12:43:47 12 THE COURT: Any questions from counsel for the
12:43:47 13 defendant?

12:43:47 14 MR. WAN: No, Your Honor.

12:43:47 15 THE COURT: We'll have you stand out in the
12:43:47 16 hall.

12:43:47 17 A JUROR: I did have probable number six.

12:43:47 18 THE COURT: Why don't you tell us about that.

12:43:47 19 A JUROR: So in regards to knowing, I don't know
12:43:47 20 anyone from the Vaughn Correctional Facility, but I do
12:43:47 21 coach. One of my close friends just retired from Ferris, so
12:43:47 22 just being a coach and sharing stories about his day and
12:43:47 23 stuff, I'm not sure in this case if it would kind of skew my
12:43:47 24 view on anything to do with the correctional facility or
12:43:47 25 people involved with the correctional facility.

12:43:47 1 THE COURT: Thank you, sir. We'll have you step
12:43:47 2 outside just for a minute.

12:43:47 3 (Juror leaving the room.)

12:43:47 4 THE COURT: So I am inclined to excuse this
12:43:47 5 juror for hardship given that he has indicated he has a
12:43:47 6 child with special needs and I can tell you based on my
12:43:47 7 understanding with child care situation this summer in light
12:43:47 8 of the pandemic, in light of the nursing care that's
12:43:47 9 available to folks with children with special needs, I think
12:43:47 10 that is an undue hardship, we can bring him back in for
12:43:47 11 further questioning if you like, but if there is no
12:43:47 12 objection, we can excuse him.

12:43:47 13 MS. MUNNINGS: No objection.

12:43:47 14 MR. WAN: No objection.

12:43:47 15 THE COURT: We'll excuse that juror.

12:43:47 16 COURTROOM DEPUTY: Your Honor, we have juror
12:43:47 17 number 18, Denise Macleish, responded yes to question 7.

12:43:47 18 THE COURT: Okay. Just give us one minute so
12:43:47 19 everyone can look up that juror. Thank you.

12:43:47 20 (Juror entering the room.)

12:43:47 21 THE COURT: Please have a seat, ma'am. I
12:43:47 22 understand that you are juror number 18; is that right?

12:43:47 23 A JUROR: That's correct.

12:43:47 24 THE COURT: That would make you Ms. Macleish.

12:43:47 25 A JUROR: Yes.

12:43:47 1 THE COURT: And Ms. Garfinkel has indicated that
12:43:47 2 you had a yes answer to question 7 which is do you or any
12:43:47 3 member of your immediate family have experience of a law
12:43:48 4 enforcement officer?

12:43:48 5 A JUROR: Correct.

12:43:48 6 THE COURT: Could you tell us a little more
12:43:48 7 about that?

12:43:48 8 A JUROR: Sure. My older brother was the former
12:43:48 9 state police manager, Thomas Macleish.

12:43:48 10 THE COURT: Was that here in Delaware?

12:43:48 11 A JUROR: Yes, it was.

12:43:48 12 THE COURT: And does your relationship with your
12:43:48 13 older brother or the fact that he was a former law
12:43:48 14 enforcement officer in your view make it difficult for you
12:43:48 15 to render a verdict based solely on the evidence in this
12:43:48 16 case?

12:43:48 17 A JUROR: No, it doesn't. But I have grown up
12:43:48 18 with him in law enforcement all my life.

12:43:48 19 THE COURT: Do you think you could be fair and
12:43:48 20 impartial if I instructed you to render a verdict just based
12:43:48 21 on the evidence in this case?

12:43:48 22 A JUROR: Absolutely.

12:43:48 23 THE COURT: Any questions from counsel for
12:43:48 24 plaintiff?

12:43:48 25 MS. COZEN: Yes. When listening to witness

12:43:48 1 testimony, do you think your relationship with your brother
12:43:48 2 would make you more likely to find a corrections officer or
12:43:48 3 someone who works in corrections credible over an inmate?

12:43:48 4 A JUROR: No, but probably my life and
12:43:48 5 experience might. I was a 38-year federal employee, but I
12:43:48 6 have worked for the federal government.

12:43:48 7 MS. COZEN: What did you do for the federal
12:43:48 8 government?

12:43:48 9 A JUROR: I worked for the Department of
12:43:48 10 Agriculture and I ran a program that we did funding in
12:43:48 11 Delaware and Maryland for rural communities.

12:43:48 12 MS. COZEN: And through this program, did you
12:43:48 13 ever interact with inmates?

12:43:48 14 A JUROR: No. No.

12:43:48 15 MS. COZEN: Prison administrators?

12:43:48 16 A JUROR: No.

12:43:48 17 MS. MUNNINGS: So can you explain more why you
12:43:48 18 believe that you have a bias --

12:43:48 19 A JUROR: I don't know that it would be a bias
12:43:48 20 as much as it would be just my experience in working over
12:43:48 21 the years and working with a variety of different people.

12:43:48 22 MS. MUNNINGS: And that would make you more
12:43:48 23 likely to trust people working with the government?

12:43:48 24 A JUROR: I don't know if it's trust working
12:43:48 25 with government, it was just that's my life experience,

12:43:48 1 that's what I have done is worked within the government, and
12:43:48 2 following government rules and regulations, things along
12:43:48 3 that line.

12:43:48 4 MS. COZEN: And would it be more difficult for
12:43:48 5 you to find against a federal employee because of your
12:43:48 6 experience?

12:43:48 7 A JUROR: No.

12:43:48 8 MS. COZEN: But you would be more likely or
12:43:48 9 would you be more likely to take the federal employee's word
12:43:48 10 because of their position?

12:43:48 11 THE COURT: No, I don't think so.

12:43:48 12 MS. COZEN: No further questions.

12:43:48 13 THE COURT: All right.

12:43:48 14 MR. WAN: Nope.

12:43:48 15 THE COURT: Thank you. We'll have you stand out
12:43:48 16 in the hall for just a minute.

12:43:48 17 A JUROR: Okay. Sure.

12:43:48 18 (Juror leaving the room.)

12:43:48 19 THE COURT: Any application?

12:43:48 20 MS. COZEN: Yes, Your Honor, we would move to
12:43:48 21 strike this juror for cause. She was just very
12:43:48 22 contradictory in terms of whether her experience in life
12:43:48 23 would affect her judgment or whether she would be able to be
12:43:48 24 impartial in this case and we found that concerning.

12:43:48 25 THE COURT: Mr. Wan.

12:43:49 1 MR. WAN: I don't think so. She said she won't
12:43:49 2 be bias. She said it was her life experience which I think
12:43:49 3 generally following jury instructions you use your life
12:43:49 4 experience when coming to a verdict. She said there is no
12:43:49 5 bias and I think as far as life experience that makes her a
12:43:49 6 fine juror.

12:43:49 7 THE COURT: I tend to agree with Mr. Wan on this
12:43:49 8 one. I listened very closely to her answers and I don't
12:43:49 9 think she was contradictory. You asked her two separate
12:43:49 10 lines of questions, one had to do with whether or not she
12:43:49 11 could put aside any bias and render a verdict based on the
12:43:49 12 instructions and the evidence at trial, she was very clear
12:43:49 13 in her responses that she could do that. You also asked her
12:43:49 14 a separate line of questions that had to do with whether or
12:43:49 15 not she would use her life experience to credit certain
12:43:49 16 witness's testimony and I agree with Mr. Wan that that is
12:43:49 17 something that we have in the jury instructions that a juror
12:43:49 18 is permitted to do. I can't find that this juror won't be
12:43:49 19 impartial or disruptive. And so we're going to have this
12:43:49 20 juror as number 12 on our list of 14.

12:43:49 21 COURTROOM DEPUTY: Your Honor, we have juror
12:43:49 22 number 19, Katherine Spangler, a yes response to question 6.

12:43:49 23 THE COURT: Okay.

12:43:49 24 (Juror entering the room.)

12:43:49 25 THE COURT: Hi. We'll flip you around here.

12:43:49 1 Please have a seat. You're juror number 19; is that right?

12:43:49 2 A JUROR: Yes.

12:43:49 3 THE COURT: And that makes you Ms. Spangler; is
12:43:49 4 that right?

12:43:49 5 A JUROR: Yes.

12:43:49 6 THE COURT: And you answered yes to question 6
12:43:49 7 which asked if you had any experiences with the Delaware
12:43:49 8 Department of Correction or any relationship with the
12:43:49 9 employees or inmates that would make it difficult for you to
12:43:49 10 be a fair and impartial juror in this case. Can we hear a
12:43:49 11 little more about that?

12:43:49 12 A JUROR: My ex-husband spent approximately five
12:43:49 13 years at Sussex Correctional Institution, so we had minor
12:43:49 14 experiences going in and out of the facility visiting him.
12:43:49 15 He met a lot of the security guards. I heard a lot of
12:43:49 16 stories while he was in there.

12:43:49 17 THE COURT: Did you recognize any of the
12:43:49 18 names --

12:43:49 19 A JUROR: No.

12:43:49 20 THE COURT: -- in the trial as someone you had
12:43:49 21 heard stories about?

12:43:49 22 A JUROR: No. No.

12:43:49 23 THE COURT: Do you think if I instructed you to
12:43:49 24 render a verdict based solely on the evidence presented in
12:43:49 25 this case that you would be able to do that?

12:43:49 1 A JUROR: I think I could, yes.

12:43:50 2 THE COURT: And is it true that you would -- so
12:43:50 3 you answered yes to question 6, which asked if it would be
12:43:50 4 difficult to be fair and impartial. Do you think you could
12:43:50 5 be fair and impartial?

12:43:50 6 A JUROR: It just made me -- I wasn't sure
12:43:50 7 whether or not I would or not, I never served on a jury
12:43:50 8 before, so I didn't know what you do when you come back
12:43:50 9 here, so I wanted to tell you.

12:43:50 10 THE COURT: All right. So you wanted to let us
12:43:50 11 know that you had an experience with an inmate, but you
12:43:50 12 don't necessarily think it would be difficult for you to be
12:43:50 13 fair and impartial. Is that fair to say?

12:43:50 14 A JUROR: Yes.

12:43:50 15 THE COURT: Let's see if there are any questions
12:43:50 16 from counsel for the plaintiff.

12:43:50 17 MS. COZEN: What types of stories would your
12:43:50 18 husband tell you about his experience?

12:43:50 19 A JUROR: Just the goings on inside.

12:43:50 20 MS. COZEN: Was it about other inmates or
12:43:50 21 guards?

12:43:50 22 A JUROR: Yeah, other inmates. He became
12:43:50 23 friends with some of the security guards, you know, that
12:43:50 24 were in there, so we knew a couple of them. Friendly basis
12:43:50 25 kind of thing.

12:43:50 1 MS. COZEN: And would that affect your ability
12:43:50 2 to judge the credibility of a witness who might be connected
12:43:50 3 to the prison or an inmate in some way?

12:43:50 4 A JUROR: I don't know. I'm not sure. I'm not
12:43:50 5 sure if it would or not, because I had, you know, some good
12:43:50 6 things that I heard and some bad things. So I kind of think
12:43:50 7 it might possibly. I'm not sure.

12:43:50 8 MS. COZEN: No further questions, Your Honor.

12:43:50 9 A JUROR: I mean, just only because I was on the
12:43:50 10 other side and I got to hear some of the stories. I don't
12:43:50 11 know -- I don't know what this case is about.

12:43:50 12 THE COURT: Yes. What prison was he at?

12:43:50 13 A JUROR: In Georgetown, SCI, and then he was in
12:43:50 14 the one at Dover as well, the one that -- it was a lease
12:43:50 15 type thing from home.

12:43:50 16 THE COURT: Mr. Wan.

12:43:50 17 MR. WAN: So did the stories your ex-husband
12:43:50 18 tell you, you said that might be able to affect your ability
12:43:50 19 to be unbiased or it would, I'm sorry, I missed that.

12:43:50 20 A JUROR: I think it would, yeah, I think it
12:43:50 21 would.

12:43:50 22 MR. WAN: No other questions, Your Honor.

12:43:50 23 THE COURT: All right. We'll have you step out
12:43:50 24 in the hall for just a minute.

12:43:50 25 A JUROR: Thank you.

12:43:50 1 (Juror leaving the room.)

12:43:50 2 THE COURT: Any application?

12:43:50 3 MS. COZEN: Yes, Your Honor, we would move to
12:43:50 4 strike this juror for cause. She did express a bias and
12:43:50 5 said she was not going to be able to remain impartial, and
12:43:51 6 that is appropriate for this trial.

12:43:51 7 THE COURT: Mr. Wan.

12:43:51 8 MR. WAN: I think in response to my question,
12:43:51 9 she couldn't be unbiased.

12:43:51 10 THE COURT: The parties are in agreement that
12:43:51 11 juror will be stricken for cause.

12:43:51 12 The next on my list is John Ditomo. No, I'm
12:43:51 13 sorry, Robert Campbell is the next. And the next after that
12:43:51 14 is John Ditomo.

12:43:51 15 COURTROOM DEPUTY: Your Honor, Juror number 20,
12:43:51 16 Robert Campbell, no responses.

12:43:51 17 THE COURT: Okay. And that makes number 13.

12:43:51 18 COURTROOM DEPUTY: Correct, Your Honor.

12:43:51 19 THE COURT: Okay.

12:43:51 20 COURTROOM DEPUTY: We have juror number 21, John
12:43:51 21 Ditomo, yes responses to 1, 7, 8, and the last question.

12:43:51 22 THE COURT: Okay. Give me one second. So it's
12:43:51 23 1, 7, 8 and 19.

12:43:51 24 (Juror entering the room.)

12:43:51 25 THE COURT: Sir, please have a seat right here.

12:43:51 1 So you are juror number 21; is that right?

12:43:51 2 A JUROR: I am.

12:43:51 3 THE COURT: And that makes you Mr. Ditomo.

12:43:51 4 A JUROR: Yes.

12:43:51 5 THE COURT: I understand that you have answered
12:43:51 6 yes to question number 1; is that right?

12:43:51 7 A JUROR: I did.

12:43:51 8 THE COURT: Can you tell us a little more about
12:43:51 9 that?

12:43:51 10 A JUROR: So I am presently on summer vacation
12:43:51 11 which in itself isn't the problem, my house is in Maryland.
12:43:51 12 A two-and-a-half day trial is going to create some problems
12:43:51 13 for me getting my parents and my sister and four nephews
12:43:51 14 from Maryland to the airport, so I was one of two cars. So
12:43:51 15 that was the situation that came up when you noted the
12:43:51 16 length of the trial. Two-and-a-half days.

12:43:51 17 THE COURT: Okay. So you're on vacation now,
12:43:51 18 you come in here today for jury duty while you're on
12:43:51 19 vacation?

12:43:51 20 A JUROR: Yes.

12:43:51 21 THE COURT: You also answered yes to number
12:43:51 22 seven which is whether you or a member of your immediate
12:43:51 23 family has experience as a law enforcement officer.

12:43:51 24 A JUROR: Does my mother-in-law count as
12:43:51 25 immediate family?

12:43:51 1 THE COURT: Why don't you tell us about that.

12:43:51 2 A JUROR: She is a state trooper for New Jersey
12:43:51 3 State Police. She works in the lab. But I wasn't sure if
12:43:51 4 that was counted as immediate family member.

12:43:51 5 THE COURT: And then we got a yes answer to
12:43:52 6 number 8 where you stated you may know some of the folks
12:43:52 7 that are presenting at the trial; is that right?

12:43:52 8 A JUROR: So I used to work for Pepper Hamilton
12:43:52 9 before its merger, and I know Joanna Cline through work.
12:43:52 10 I'm an attorney. I know her through work. I also went to
12:43:52 11 high school with her and Doug Hermann who is I believe
12:43:52 12 Delaware counsel, he is not on the list, but I recognize
12:43:52 13 him, he and I worked very closely on the Board of Bar
12:43:52 14 Examiners.

12:43:52 15 THE COURT: Is it also the case that you and I
12:43:52 16 took the bar together?

12:43:52 17 A JUROR: It is, Your Honor, yes. That was the
12:43:52 18 answer to the last question, Your Honor, I know the judge
12:43:52 19 presiding in this matter.

12:43:52 20 THE COURT: Is it also the case that we went out
12:43:52 21 for drinks after finishing the bar exam?

12:43:52 22 A JUROR: We did. From what I remember.

12:43:52 23 THE COURT: Yeah, it's a little fuzzy for me,
12:43:52 24 too. Why don't I ask you to step out into the hall for a
12:43:52 25 minute, sir.

12:43:52 1 A JUROR: Okay.

12:43:52 2 THE COURT: Thanks.

12:43:52 3 (Juror leaving the room.)

12:43:52 4 THE COURT: So Mr. Ditomo was on vacation. I
12:43:52 5 think he could have asked to be delayed in light of the fact
12:43:52 6 that we have now extended this into the next week, I am
12:43:52 7 inclined to release people for vacation plans which it
12:43:52 8 sounds like he has. If there is an objection, we can bring
12:43:52 9 him back in here and ask him the rest of the questions, but
12:43:52 10 I think that's a reason in and of itself to excuse him from
12:43:52 11 the panel. Any objections to that?

12:43:52 12 MS. MUNNINGS: No, Your Honor.

12:43:52 13 MR. WAN: No.

12:43:52 14 THE COURT: All right. We'll go ahead and
12:43:52 15 excuse Mr. Ditomo.

12:43:52 16 COURTROOM DEPUTY: Your Honor, juror number 22,
12:43:52 17 William Roca.

12:43:52 18 THE COURT: Okay.

12:43:52 19 COURTROOM DEPUTY: Yes responses to questions 1,
12:43:52 20 6, and 14.

12:43:52 21 THE COURT: Okay.

12:43:52 22 (Juror entering the room.)

12:43:52 23 THE COURT: Please have a seat here, sir. You
12:43:52 24 are juror number 22; is that right?

12:43:52 25 A JUROR: Yes.

12:43:52 1 THE COURT: That makes you Mr. Roca; is that
12:43:52 2 right?

12:43:52 3 A JUROR: Yes.

12:43:52 4 THE COURT: You answered yes to my question
12:43:52 5 about whether or not the length of the trial or the schedule
12:43:52 6 presents a problem for you.

12:43:52 7 A JUROR: So special, I live down in Rehoboth
12:43:52 8 and I work two jobs, one of which is during the day, one is
12:43:52 9 at night which is a restaurant, which I'm sure everyone
12:43:52 10 knows the restaurants are short staffed now, so if it does
12:43:52 11 run to we said 5:00 here, it takes me three hours to get
12:43:52 12 back because of traffic, I won't be able to work at the
12:43:52 13 restaurant, which might pose a problem for them because of
12:43:52 14 the short staffing, and might have to close, so on and so
12:43:52 15 forth. It will be a ripple effect.

12:43:52 16 THE COURT: Is it a restaurant that's open late
12:43:52 17 into the evening?

12:43:52 18 A JUROR: It's open until about 10 o'clock.

12:43:52 19 THE COURT: And you normally at that time going
12:43:52 20 to bed and get back up for your job at what time?

12:43:52 21 A JUROR: 5:00 a.m.

12:43:52 22 THE COURT: Let me ask you about question number
12:43:52 23 6, which asked if you had any experiences with the Delaware
12:43:52 24 Department of Correction or relationships with Delaware
12:43:52 25 Department of Correction employees or inmates that would

12:43:53 1 make it difficult for you to be fair and impartial in this
12:43:53 2 case.

12:43:53 3 A JUROR: So I am a Delaware veteran, Army
12:43:53 4 National Guard, 198 out of Georgetown. I deployed in 2013
12:43:53 5 and a few of my comrades were correctional officers for
12:43:53 6 Delaware.

12:43:53 7 THE COURT: Okay. And so what about your
12:43:53 8 relationship with them, if anything, you think might make it
12:43:53 9 difficult for you to be fair and impartial?

12:43:53 10 A JUROR: Just based on their, some of their
12:43:53 11 stories that they have told, the environment they were in
12:43:53 12 might make me go one way or the other, just based on that
12:43:53 13 knowledge.

12:43:53 14 THE COURT: Do you think if I instructed you to
12:43:53 15 render a verdict based solely on the evidence in this case
12:43:53 16 that you would be able to do that?

12:43:53 17 A JUROR: Yes.

12:43:53 18 THE COURT: Let me ask you about question number
12:43:53 19 14, where it ask if you find that Mr. Pierce violated
12:43:53 20 Mr. Szubielski's constitutional rights would you have any
12:43:53 21 difficulty in awarding money damages to compensate
12:43:53 22 Mr. Szubielski, why don't you tell me your answer to that?

12:43:53 23 A JUROR: I said yes without really knowing what
12:43:53 24 the case is about. If it didn't impede the plaintiff to
12:43:53 25 make more money or lost money because of whatever happened,

12:43:53 1 then I don't think money should be awarded.

12:43:53 2 THE COURT: Okay. Do you think if I instructed
12:43:53 3 you on how you would award damages in the case that you
12:43:53 4 would be able to follow those instructions?

12:43:53 5 A JUROR: If it didn't involve a monetary value,
12:43:53 6 yes.

12:43:53 7 THE COURT: Let me make sure I understand your
12:43:53 8 answer. So if I told you that you could and should award
12:43:53 9 the plaintiff damages, even if he didn't lose any money in
12:43:53 10 the case, he just suffered injury, would you be able to
12:43:53 11 follow that instruction?

12:43:53 12 A JUROR: I don't think so.

12:43:53 13 THE COURT: Okay. Any questions from counsel
12:43:53 14 for plaintiff?

12:43:53 15 MS. COZEN: No, Your Honor.

12:43:53 16 THE COURT: Any questions for counsel from
12:43:53 17 defendant?

12:43:53 18 MR. WAN: No, Your Honor.

12:43:53 19 THE COURT: We're going to have you step out
12:43:54 20 into the hall for a minute.

12:43:54 21 (Juror leaving the room.)

12:43:54 22 THE COURT: Any applications?

12:43:54 23 MS. COZEN: Yes, Your Honor, we would move to
12:43:54 24 strike this juror for cause. He openly said he would not be
12:43:54 25 able to apply the law as you instructed him. He also

12:43:54 1 admitted that he has heard stories that might affect his
12:43:54 2 ability to be fair and impartial. We don't think that's
12:43:54 3 appropriate.

12:43:54 4 MR. WAN: I think his question about the
12:43:54 5 compensatory damage might be an issue.

12:43:54 6 THE COURT: So the parties are in agreement that
12:43:54 7 the juror should be stricken and I agree as well.

12:43:54 8 COURTROOM DEPUTY: Your Honor, juror number 23,
12:43:54 9 Jeffrey Lowden, yes answers to 1, 6, 14, and 17.

12:43:54 10 THE COURT: Thank you.

12:43:54 11 (Juror entering the room.)

12:43:54 12 THE COURT: Hello, sir. You are juror number
12:43:54 13 23; is that right?

12:43:54 14 A JUROR: Yes.

12:43:54 15 THE COURT: That makes you Mr. Louden?

12:43:54 16 A JUROR: Yes.

12:43:54 17 THE COURT: So you answered yes to question
12:43:54 18 number 1 that asked about the length of the trial and the
12:43:54 19 schedule presenting a special problem for you.

12:43:54 20 A JUROR: Yeah, I mean, I have a sales
12:43:54 21 commission job where I don't get paid if I'm not working, so
12:43:54 22 time off is really detrimental.

12:43:54 23 THE COURT: Okay. I understand. Let me ask you
12:43:54 24 about number 6 which ask if you had any experiences with
12:43:54 25 Delaware Department of Correction or any relationships with

12:43:54 1 employees or inmates that would make it difficult for you to
12:43:54 2 be fair and impartial, why don't you tell us about that.

12:43:54 3 A JUROR: My wife's cousin worked for the
12:43:54 4 Department of Corrections, so just, you know, that's the
12:43:54 5 relationship I have with one of the employees.

12:43:54 6 THE COURT: Do you think your relationship with
12:43:54 7 your wife's cousin would make it hard for you to be fair and
12:43:54 8 impartial.

12:43:54 9 A JUROR: I mean, I have heard stories and so
12:43:54 10 yes, short answer.

12:43:54 11 THE COURT: Okay. And let me ask you about
12:43:54 12 question number 14, which asked if you find that Mr. Pierce
12:43:54 13 violated Mr. Szubieliski's constitutional rights would you
12:43:54 14 have any difficulty awarding money damages. You answered
12:43:54 15 yes.

12:43:54 16 A JUROR: Yeah. I mean, again, I need to hear
12:43:54 17 the details, but hearing, you know, about people getting
12:43:54 18 free money is something that bothers me.

12:43:54 19 THE COURT: Do you think if I instructed you
12:43:54 20 that you are to award damages if you find that damages are
12:43:54 21 appropriate in this case based the evidence that you would
12:43:54 22 be able to do that?

12:43:54 23 A JUROR: Maybe. I mean, again, I just feel a
12:43:54 24 certain way about people getting free money.

12:43:54 25 THE COURT: Okay. And you answered yes to

question number 17 which ask if you're selected to sit as a juror, are you aware of any reason that you would be unable to the render a verdict based on the evidence presented at trial.

A JUROR: Yeah. I mean, again, with knowing my relative that was in working for the Department of Corrections and, you know, possibly looking to gain financial compensation for the -- you know, out of the case, I don't know, those things are just something that could possibly make me unable to render a verdict based on the evidence.

THE COURT: Okay. Any questions from counsel for plaintiff?

MS. COZEN: No, Your Honor.

THE COURT: Any questions from counsel for defendant?

MR. WAN: No, Your Honor.

THE COURT: We're going to have you step outside for a minute.

A JUROR: Thanks.

(Juror leaving the room.)

THE COURT: Any application?

MS. MUNNINGS: Yes.

MS. COZEN: Yes, Your Honor. We would move to strike this juror for cause. He openly admitted he was not

going to be fair and impartial based on stories he heard from his wife's cousin and he stated he could not apply the law or render a verdict based on the law that you are instructing him on.

THE COURT: All right. Mr. Wan.

MR. WAN: Yeah.

THE COURT: All right. I agree. We will excuse this juror.

COURTROOM DEPUTY: Old neighbor to boot.

THE COURT: The next one I have on my list by the way is Ronald Simon -- wait, sorry, who did we just talk to?

MS. McCOWAN: Mr. Loudon.

THE COURT: The next one I have is Peter Slaton and then Ronald Simmons.

COURTROOM DEPUTY: Your Honor, juror number 24, Peter Slaton. No responses. And that will make juror number 14 on our list.

THE COURT: We have number 14. Do we want to run through those now, Ms. Garfinkel, or what makes the most sense?

COURTROOM DEPUTY: I have our administrator seating them in that order from the left side if you're looking them from the bench. Do you want to read their name as well?

12:43:55 1 THE COURT: Let's do that just for the record
12:43:55 2 and make sure we're all on the same page here.

12:43:55 3 COURTROOM DEPUTY: Juror number 1, Carla
12:43:55 4 Cubbage. Juror number 3, Amy Tracy. Juror number 4,
12:43:55 5 Michael Whittaker. Juror number 5, Michelle Crocker. 6,
12:43:55 6 Venkatesan Ranganathan. Juror number 7, Vera Brown. 8,
12:43:55 7 Tyler Phommachanh. Juror number 9, Catherine Fridell.
12:43:56 8 Juror 13, Juan Cabrera. 14, Tammy Brown. 16, Luigi
12:43:56 9 Schiavoni. 18, Denise Macleish. 20, Robert Campbell. And
12:43:56 10 24, Peter Slaton.

12:43:56 11 THE COURT: Okay. So the way we're going to
12:43:56 12 proceed is this, we're going to go back into the courtroom
12:43:56 13 and I am going to announce to the venire that we're now
12:43:56 14 going to start the preemptory challenge process. Each side
12:43:56 15 is going to get three preemptory challenges. Ms. Garfinkel
12:43:56 16 is going to go back and forth with a clipboard. Once we're
12:43:56 17 done with that, we're going to seat the eight who have not
12:43:56 18 been stricken in order in the jury box 1 through 8.

12:43:56 19 At that point in time, I'll bring counsel to
12:43:56 20 side-bar and ask you if there are any objections to how
12:43:56 21 we've conducted the jury selection process. Once we're done
12:43:56 22 with that, we will excuse the remaining jurors in the
12:43:56 23 courtroom. We'll have our eight. We'll swear them in and
12:43:56 24 then we'll take a break.

12:43:56 25 Any questions about how we're going to proceed?

12:43:56 1 MS. COZEN: Your Honor, would it be possible to
12:43:56 2 have a ten-minute break to consult among ourselves and with
12:43:56 3 our co-counsel?

12:43:56 4 THE COURT: Ten minutes is fine, but I'll just
12:43:56 5 ask to hurry it up only because we've had the jurors here
12:43:56 6 for an extended period of time today and I want to cut them
12:43:56 7 loose to go to lunch before we get hungry jurors.

12:43:56 8 So we'll see you back in the courtroom in ten
12:43:56 9 minutes.

12:56:35 10 (A brief recess was taken.)

12:56:39 11 THE COURT: Please be seated.

12:56:41 12 All right. Ladies and gentlemen, now we're
12:56:41 13 going to move on to our preemptory challenge process. Those
12:56:49 14 are challenges for which counsel can strike members from the
12:56:53 15 jury for no reason.

12:56:55 16 Ms. Garfinkel, can you begin the preemptory
12:57:00 17 challenge.

12:57:04 18 COURTROOM DEPUTY: Yes.

12:57:09 19 MS. CLINE: May I ask a clarifying question? I
12:57:11 20 want to make sure there is a number written next to each
12:57:14 21 name, that's the juror's number?

12:57:30 22 COURTROOM DEPUTY: That's the juror's number.

12:57:34 23 MS. CLINE: Okay. Thank you.

13:01:39 24 COURTROOM DEPUTY: When I call your juror
13:01:42 25 number, please come forward.

13:01:48 1 Juror number 1. Ma'am, you're going to be in
13:01:52 2 the first row, first seat. You can enter right here. You
13:01:56 3 can go behind counsel, right up there.

13:02:00 4 Juror number 4. Sir, you'll be the first row,
13:02:15 5 the third seat.

13:02:16 6 Juror number 6. You'll also be in the first
13:02:39 7 row.

13:02:43 8 Juror number 7. Ma'am, you'll also be in the
13:02:55 9 first row.

13:02:55 10 Juror number 9. Ma'am, you will be in the
13:03:09 11 second row, first seat.

13:03:11 12 Juror number 13.

13:03:41 13 Juror number 16.

13:04:05 14 And juror number 20.

13:04:31 15 THE COURT: Thank you, Ms. Garfinkel. At this
13:04:31 16 time I would like to see counsel at side-bar.

13:13:41 17 (Side-bar discussion.)

13:13:41 18 THE COURT: So for the record at this point we
13:13:41 19 have eight jurors seated in the box. Do we have any
13:13:42 20 objections as to how the juror selection process was
13:13:42 21 conducted today?

13:13:42 22 MS. CLINE: Not from plaintiff.

13:13:42 23 THE COURT: No objection?

13:13:42 24 MR. WAN: No.

13:13:42 25 THE COURT: So what I intend to do at this point

13:13:44 1 is excuse the remaining jurors, we'll swear these jurors in
13:13:44 2 and we'll let them go for lunch and then we'll come back and
13:13:44 3 do preliminary jury instructions.

13:13:44 4 (End of side-bar.)

13:13:44 5 For those of you who are not needed in the jury
13:13:44 6 box, I want to thank you all for being here today and being
13:13:44 7 so patient and making yourselves available to serve. You
13:13:44 8 will not be on the jury today. You are free to collect your
13:13:44 9 things and go on about your day. Again, thank you very
13:13:44 10 much.

13:13:44 11 For those of you seated in the jury box, the
13:13:44 12 first order of business is that we have another oath for to
13:13:45 13 you today.

13:13:45 14 COURTROOM DEPUTY: Please stand and raise your
13:13:45 15 right hand. You and each of you do solemnly swear, those of
13:13:45 16 you who swear, and you and each of you do affirm, those of
13:13:45 17 you who affirm, that you will well and truly try the issue
13:13:45 18 joined wherein Gerard Szubielski is plaintiff and David
13:13:45 19 Pierce is defendant, and that you will a true verdict render
13:13:45 20 according to the evidence, so help you God, those of you who
13:13:45 21 swear, and you do so affirm, those of you who affirm. The
13:13:45 22 proper response is do.

13:13:45 23 THE JURY: I do.

13:13:45 24 COURTROOM DEPUTY: Thank you. You may be
13:13:45 25 seated.

13:13:45 1 THE COURT: So ladies and gentlemen of the jury,
13:13:45 2 I am going to briefly tell you a few things right now and I
13:13:45 3 will let you go off for lunch. Ms. Garfinkel in a moment is
13:13:45 4 going to show you our jury room. It's right back here.
13:13:45 5 We're actually in Judge Burke's courtroom right now because
13:13:45 6 my courtroom is currently being constructed. So if you're
13:13:45 7 looking to come back tomorrow, remember that it's not going
13:13:45 8 to be Judge Hall's courtroom because I am in a closet
13:13:45 9 upstairs, it's going to be Judge Burke's courtroom here.
13:13:45 10 The room is going to be yours to use throughout the course
13:13:45 11 of the trial. There are restrooms back there. There is a
13:13:45 12 telephone. Ms. Garfinkel will explain all that to you and
13:13:45 13 explain how to get in and out of chambers. You will be
13:13:45 14 released to find some lunch and we will expect you back here
13:13:45 15 in about an hour. It's 1:07 right now, so approximately at
13:13:45 16 2:15.

13:13:45 17 When you come back, I'm going to have some
13:13:45 18 preliminary instructions for you and then we're going to let
13:13:45 19 you go for the day. But in those instructions I will tell
13:13:45 20 you more about your duties as jurors in this case.

13:13:45 21 Then tomorrow we'll come back, start bright and
13:13:45 22 early at 9:00 a.m. for opening statements and we'll go from
13:13:45 23 there. As I'll explain to you in a minute, every day you
13:13:45 24 will be done no later than 5:00 p.m., some days you may be
13:13:45 25 done sooner. There will be a break in morning, a lunch

13:13:45 1 break, and a break in the afternoon.

13:13:45 2 A couple quick things before I let you go.
13:13:45 3 There should be no talking about the case until all the
13:13:45 4 evidence is concluded and you're deliberating, so among
13:13:45 5 yourselves and with your family or with anyone else, you
13:13:46 6 shall not talk about the case until I tell you that it's
13:13:46 7 okay to talk about the case. Also, Ms. Garfinkel will
13:13:46 8 explain to you, please keep your juror stickers for
13:13:46 9 identification on when you're out and about. This is
13:13:46 10 Wilmington so we have lawyers around and it's a small town,
13:13:46 11 we need to make sure you're identifying yourself when you're
13:13:46 12 out grabbing your lunch. None of us involved in this case
13:13:46 13 are allowed to talk to you until the case is over.

13:13:46 14 So if you see anybody in the elevator going to
13:13:46 15 lunch or coming back and they don't say anything to you,
13:13:46 16 it's not because they're being rude, it's because they're
13:13:46 17 not permitted to.

13:13:46 18 With that, we'll have Ms. Garfinkel take you out
13:13:46 19 and we'll have you back at 2:15 for preliminary jury
13:13:47 20 instructions. I'm sorry. I need to ask one thing, which is
13:13:47 21 we're still at the tail end of the Covid-19 pandemic. I can
13:13:47 22 tell you that I know for sure that some of you have been
13:13:47 23 vaccinated, I don't know about the rest of you. I don't
13:13:47 24 know for sure that any of you have not been vaccinated, so
13:13:47 25 it's quite possible that you all or possible that one or

13:13:46 1 more of you are not. When up get back to the jury room, you
13:13:46 2 should make a decision about whether or not you would like
13:13:46 3 to wear your masks for trial. And the way that we're going
13:13:46 4 to do this is this, in this courtroom, if all of you agree
13:13:46 5 that you don't want to wear masks, we're going to have none
13:13:46 6 of you wear masks. If one of you have agrees, or wants to
13:13:46 7 wear a mask, then everybody is going to wear a mask. That's
13:13:46 8 how we're going to operate going forward. I know that the
13:13:46 9 guidance is rapidly changing, but you have all come in
13:13:46 10 during a time in our country where we have dealt with some
13:13:46 11 challenges and I want everyone to feel comfortable rendering
13:13:46 12 their service as jurors. We have had juries in the last
13:13:46 13 couple of weeks and no one has worn a mask. We'll do our
13:13:47 14 best to keep you separated by at least three feet. There
13:13:47 15 should be room in the jury room to keep you separated by at
13:13:47 16 least three feet.

13:13:47 17 If you prefer to eat your lunch elsewhere,
13:13:47 18 that's totally fine. You can also eat your lunch in the
13:13:47 19 jury room. But if there is no one on the jury panel that
13:13:47 20 would like us to wear masks, then that's what we're going to
13:13:47 21 do. So let my courtroom deputy know how you intend to
13:13:47 22 proceed when you go back there as well. With that, we'll
13:13:47 23 let you go back to the jury room.

13:13:47 24 (Jury the courtroom at 1:04 p.m.)

13:13:47 25 THE COURT: Okay. So we are going to let the

13:13:47 1 jurors go to lunch. Why don't we do this, why don't we all
13:13:47 2 come back at 2 o'clock and then we can talk about anymore
13:13:47 3 information we have with respect to the jurors masking
13:13:47 4 status and decide what we want to do. I can tell you what I
13:13:47 5 am inclined to do which is anyone who is at the podium
13:13:47 6 asking questions can take their mask off. Anyone who is on
13:13:47 7 the witness stand can take their mask off. If the jurors
13:13:47 8 determine they don't want to wear masks and are okay without
13:13:47 9 wearing masks, I'll put it to you to take them off if you
13:13:47 10 are vaccinated. If you are not vaccinated, I would prefer
13:13:47 11 you to keep them on in the courtroom, notwithstanding any
13:13:47 12 other federal or state guidance.

13:13:47 13 Does anyone have any questions or statements
13:13:47 14 they want to put on the record about how they proceed with
13:13:47 15 masks?

13:13:47 16 MS. CLINE: Not from us.

13:13:47 17 THE COURT: Do you know from your client if he's
13:13:47 18 vaccinated? If you want to say it on the record you don't
13:13:47 19 have to, but I'm not sure that that's going to be an issue
13:13:47 20 for your side.

13:13:47 21 MS. CLINE: Our understanding is he's been
13:13:47 22 vaccinated.

13:13:47 23 THE COURT: Mr. Wan, do you happen to know if he
13:13:47 24 has a preference for mask or not mask?

13:13:47 25 MR. WAN: He wore his mask for the other trial,

13:13:47 1 but I think he's fine for the other way.

13:13:47 2 THE COURT: I'll leave it for his option. If he
13:13:47 3 wants to keep it on while's at the table or while he's on
13:13:47 4 the stand, that's his option. I won't force anyone to take
13:13:47 5 their mask off if they don't want to.

13:13:47 6 Any other questions? All right. Very good.
13:13:47 7 We'll be in recess until 2:00.

14:02:55 8 (A lunch recess was taken.)

14:02:55 9 THE COURT: Please be seated. So I know for
14:03:10 10 sure there are a couple of things that we can address and
14:03:13 11 get out of the way in the few minutes that we got before we
14:03:16 12 bring the jury back in for preliminary instructions. The
14:03:19 13 first is that it's my understanding that the jury has agreed
14:03:25 14 to go maskless. I see Mr. Wan's position already. Let the
14:03:31 15 record reflect, Mr. Wan is unmasked as he was permitted to
14:03:42 16 do and the other side has as well. It's up to you to do
14:03:47 17 what you want. If you want to keep it on, that's perfectly
14:03:52 18 appropriate. I don't have a view either way.

14:03:54 19 Anyone have anything else they want to say about
14:03:57 20 concerns about witnesses wearing masks or not wearing masks
14:04:00 21 or how they want to proceed?

14:04:02 22 MS. CLINE: We have no concerns.

14:04:05 23 MR. WAN: No, Your Honor.

14:04:05 24 THE COURT: Okay. Well, unless anyone objects,
14:04:08 25 I am going to have the courtroom staff go maskless if they

14:04:13 1 choose to as well. I can say for the record that all of my
14:04:16 2 folks, including myself, have been vaccinated, so I don't
14:04:20 3 have any concerns about that.

14:04:21 4 The second thing I wanted to get addressed was
14:04:26 5 we had a concern from Mr. Wan about which side of the
14:04:31 6 courtroom the plaintiff should be seated on. So I took that
14:04:34 7 under advertisement and we do need to have plaintiff sit on
14:04:40 8 the other side of the courtroom. And there is a number of
14:04:42 9 reasons for that. He will get brought in and out through
14:04:49 10 this doorway right here that's right on the side.

14:04:51 11 We don't have to decide now if you want me to
14:04:54 12 say something to the jury, but what I would ask is after we
14:04:57 13 conclude today, you talk to each other and think about if
14:05:00 14 there is something you do want me to say. They may not even
14:05:05 15 notice that you were on opposite sides especially since you
14:05:09 16 haven't said anything to them yet or addressed them in any
14:05:12 17 way. If you just want to switch, it may call attention to
14:05:17 18 it if we make a comment, but I'll let you discuss that among
14:05:21 19 yourselves and see if you can agree. And if you can't, we
14:05:25 20 can take that up tomorrow morning before we start.

14:05:27 21 The other thing I had on my list was I had a
14:05:30 22 question about the deposition read ins, and I'll just ask
14:05:33 23 before the day that those are going to get read in that you
14:05:37 24 let me know that those are coming. I was wondering whether
14:05:42 25 or not you want a deposition instruction read before those

14:05:48 1 read ins. It seems it would be appropriate to do so
14:05:51 2 otherwise it may be confusing for the jury.

14:05:54 3 Does anyone have any thoughts about that?

14:05:56 4 MS. CLINE: I think we agree with the Court that
14:05:58 5 we prefer the instructions to be read.

14:06:00 6 MR. WAN: I think that makes sense.

14:06:01 7 THE COURT: So I'll plan to do that. It's going
14:06:03 8 to be the same one that we have in the final jury
14:06:06 9 instruction, but the only thing I might change is the tense
14:06:09 10 of the verb. I can't remember exactly what it says.

14:06:11 11 Another thing I had on my list pertains to
14:06:14 12 business records. As you saw in our final pretrial order
14:06:17 13 after the pretrial conference that we made some decisions
14:06:20 14 about exhibits. Those were made based on the understanding
14:06:23 15 that there was no objection to any of the documents on the
14:06:26 16 basis that they failed to qualify as a business record.

14:06:29 17 If that's not the case, though, you should let
14:06:32 18 me know so that we can make sure to have the party who is
14:06:35 19 offering the record lay the foundation for them to be a
14:06:38 20 business record. Does that make sense the way I had
14:06:41 21 expressed it?

14:06:44 22 I don't think anyone was objecting to those
14:06:47 23 documents on the basis that they didn't meet one of the
14:06:50 24 elements of the record. I think there were other objections
14:06:53 25 including whether or not it was hearsay within hearsay and

14:07:04 1 whether or not they were prejudicial under Rule 403, but I
14:07:08 2 didn't hear anything say this form was a form that was
14:07:11 3 regularly kept by a prison and, therefore, it can't be a
14:07:14 4 business record. Am I misunderstanding what these receipts
14:07:18 5 were about?

14:07:18 6 MS. MUNNINGS: No, Your Honor.

14:07:19 7 THE COURT: Work with each other and make sure
14:07:21 8 you let me know ahead of time whether or not there is going
14:07:23 9 to be an objection on that basis so that we can make sure
14:07:27 10 the other side lays a foundation and we didn't have to deal
14:07:30 11 with it at trial.

14:07:31 12 MS. SONG: Your Honor, Rebecca Song for the
14:07:34 13 record.

14:07:34 14 Just so I understand, if a party tries to the
14:07:38 15 admit what we -- what may be a business record, we still
14:07:41 16 need to lay a foundation and if we don't, then it's
14:07:44 17 objectionable.

14:07:44 18 THE COURT: If the other side agrees that there
14:07:48 19 is no objection, then you can just admit it without laying a
14:07:51 20 foundation. But I had assumed there was no objection on
14:07:52 21 that basis, but I also didn't ask, so I just wanted to let
14:07:52 22 you know that I hadn't made a ruling that those are business
14:08:00 23 records. They looked to me like they were. See if you can
14:08:00 24 get it worked out among yourselves, otherwise we take it up
14:08:00 25 on the day of.

14:08:11 1 MS. SONG: Thank you, Your Honor.

14:08:12 2 THE COURT: That's everything I had on my list
14:08:13 3 for today. Anything anybody else wants to take up right now
14:08:16 4 before we bring them in?

14:08:19 5 MS. CLINE: A couple of housekeeping items for
14:08:21 6 us, just to be triple checked to make sure nothing on our
14:08:25 7 end requires to get Mr. Szubielski here.

14:08:28 8 THE COURT: I believe we are issuing a writ, a
14:08:34 9 habeas corpus today. Is that something that the state, you
14:08:37 10 know, Mr. Wan, can just take and have the plaintiff produced
14:08:41 11 tomorrow, do you happen to know?

14:08:47 12 MS. McCOWAN: I'm happy to speak because I was
14:08:49 13 the liaison. I know that myself and DOC's counsel which is
14:08:51 14 within DOJ had communicated with the prison and we're all on
14:08:55 15 the same page that he will be transported tomorrow. I seen
14:09:01 16 an e-mail that confirms that. I don't know or haven't been
14:09:04 17 told that there is anything else that we need to do.

14:09:09 18 The last I heard was that there was something
14:09:15 19 with the marshal's office and it seems on this e-mail that
14:09:19 20 that has happened, but I don't have 100 percent clarity that
14:09:23 21 everything tomorrow will go smoothly.

14:09:25 22 THE COURT: I do know when there is prisoners,
14:09:28 23 there has to be coordination. It's my understanding based
14:09:32 24 on some of the discussions that were had today that, in
14:09:35 25 fact, he doesn't get transferred into marshal's custody but

14:09:39 1 remains in state's custody, but there still has to be
14:09:42 2 coordination by the marshal's office, so that's the holdup
14:09:46 3 with making sure all that can happen.

14:09:48 4 Do you happen known what time they're able to
14:09:50 5 bring him over? Will he be able to be here at 8:30?

14:09:56 6 MS. McCOWAN: I am not aware. We can make the
14:09:58 7 request. We did provide the number that the marshal service
14:10:01 8 gave us to facilitate the transfer and we did make it clear
14:10:05 9 that the trial was supposed to last three business days so
14:10:09 10 that he should be available here Thursday, Friday, and
14:10:12 11 Monday. So if 8:30 is the time, I'm happy to convey that
14:10:17 12 information.

14:10:17 13 THE COURT: Ms. Cline, anything you want to say
14:10:19 14 about that?

14:10:20 15 MS. CLINE: That would be great.

14:10:21 16 THE COURT: Thank you so much. Anything else?

14:10:25 17 MS. CLINE: Two more quick ones. We're having a
14:10:29 18 little struggle with the Court's WiFi. Is there a member of
14:10:32 19 your staff who we may connect with after the jury leaves?

14:10:33 20 THE COURT: Absolutely. I will connect you with
14:10:36 21 Ms. Garfinkel after we excuse the jury for today, and she
14:10:40 22 should be able to get you in touch with the court's IT
14:10:43 23 staff. I don't know if it's a password issue or a signal
14:10:46 24 issue, but we can try to get that through for you.

14:10:50 25 MS. CLINE: Perfect.

14:10:52 1 We were wondering whether we could get a list of
14:10:55 2 the jurors as impaneled.

14:10:58 3 THE COURT: Yes, we can do. Do you have the
14:11:09 4 list in alphabetical?

14:11:11 5 MS. CLINE: We have the alphabetical, but not
14:11:14 6 the one that is assigned juror numbers.

14:11:16 7 THE COURT: I'm going to direct you to my law
14:11:19 8 clerk afterwards and she can walk you through it. I have
14:11:23 9 got a list as well.

14:11:24 10 MS. CLINE: Thank you.

14:11:25 11 THE COURT: Mr. Wan.

14:11:26 12 MR. WAN: Your Honor, two things. Really, one.
14:11:28 13 I think we said the jury, are we going to start evidence at
14:11:31 14 9:00 and have us be here at 8:30 or were we going to be here
14:11:34 15 at 9:00 and start at 9:00?

14:11:36 16 THE COURT: Yeah, because they were inconsistent
14:11:40 17 in the voir dire and preliminary jury instructions, weren't
14:11:44 18 they? Let's have us all come at 8:30 tomorrow morning and
14:11:48 19 then we'll get started with opening statements at 9:00.

14:11:52 20 MR. WAN: And the last thing I had was I was
14:11:56 21 going to -- I generally use a podium to address the jury in
14:11:59 22 openings. Is there like another one, a mini one that comes
14:12:03 23 in, or we'll just try to use this.

14:12:06 24 THE COURT: So we thought about this. The fact
14:12:09 25 that the jury has now agreed to remove their masks does make

14:12:13 1 a difference to me. I prefer that parties stay in a box
14:12:19 2 that goes no farther away from the podium than where the
14:12:24 3 court reporter is sitting. So you're free to walk around
14:12:28 4 here. If you want to bring in your own podium, that's fine
14:12:32 5 as well.

14:12:32 6 MR. WAN: I didn't know -- in state court they
14:12:35 7 have a separate small one you see. I don't know if it's
14:12:38 8 called a lectern. I didn't know if the court had one.

14:12:42 9 THE COURT: I know that the U.S. attorneys'
14:12:45 10 office has a podium that they take out of the closet and
14:12:48 11 bring over, it's not one you want.

14:12:51 12 MR. WAN: Thank you, Your Honor.

14:12:54 13 THE COURT: So you're welcome to walk here. I
14:12:57 14 ask that you not get too close -- you're going to be seated
14:13:01 15 on opposite sides, but I ask that you not get too close to
14:13:05 16 the other side's counsel table. There is a little room to
14:13:08 17 move. I don't want anyone getting too close to jury.

14:13:12 18 MR. WAN: I can stand at the side just so I'm
14:13:15 19 facing them, Your Honor.

14:13:18 20 THE COURT: Any other questions? I believe that
14:13:22 21 Ms. Garfinkel is waiting back in chambers to let all the
14:13:25 22 jurors in, and she's going to bring them out. I'm going to
14:13:29 23 stay here at the bench but you should feel free to do what
14:13:32 24 you need to do.

14:24:12 25 (A brief recess was taken.)

14:24:14 1 THE COURT: Ms. Garfinkel is going to bring in
14:24:17 2 the jury.

14:24:18 3 (Jury entering the courtroom at 2:24 p.m.)

14:25:37 4 THE COURT: Please be seated. Welcome back,
14:25:48 5 ladies and gentlemen of the jury. Ms. Garfinkel, my deputy,
14:25:51 6 is going to hand each of you a copy of a document called
14:25:55 7 preliminary jury instructions and the first thing we're
14:25:58 8 going to do in this trial is I am going to read this
14:26:02 9 document to you.

14:26:04 10 So you each have your own copy and that will be
14:26:13 11 yours to keep throughout the trial. You're free to follow
14:26:17 12 along and read from the paper or you can put it down and
14:26:21 13 listen if you prefer, whatever you like.

14:26:23 14 Ladies and gentlemen, now that you have been
14:26:28 15 sworn, I have the following preliminary instructions for
14:26:32 16 your guidance as jurors in this case. You will hear the
14:26:36 17 evidence, decide what the facts are, and then apply those
14:26:40 18 facts to the law that I will give you. You, and only you,
14:26:44 19 will be the judges of the facts. You will have to decide
14:26:48 20 what happens. I play no part in judging the facts. You
14:26:52 21 should not take anything I may say or do during the trial as
14:26:56 22 indicating what I think of the evidence or what your verdict
14:27:00 23 should be. My role is to be the judge of the law. I make
14:27:04 24 whatever legal decisions have to be made during the course
14:27:08 25 of the trial and I will explain to you the legal principles

14:27:11 1 that must guide you in your decision. You must follow that
14:27:14 2 law whether you agree with it or not.

14:27:17 3 I will now give you a brief overview of who the
14:27:20 4 parties are and what each contends. The plaintiff is Gerard
14:27:29 5 Szubielski who had been incarcerated at the James T. Vaughn
14:27:34 6 Correctional Center in Smyrna, Delaware during the relevant
14:27:36 7 time period. During the trial you may hear Mr. Szubielski
14:27:39 8 referred to by his name, or as plaintiff. You may also hear
14:27:44 9 the James T. Vaughn Correctional Center referred to as
14:27:48 10 Vaughn or JTVCC. The defendant is David Pierce who was a
14:27:51 11 warden at the James T. Vaughn Correctional Center during the
14:27:58 12 relevant time period. During the trial, you may hear
14:28:03 13 Mr. Pierce referred to by his name or defendant.

14:28:07 14 Mr. Szubielski alleges a violation of his
14:28:10 15 constitutional rights under the First Amendment of the
14:28:14 16 United States Constitution. Specifically, Mr. Szubielski
14:28:17 17 brings a claim under Title 42, United States Code
14:28:21 18 Section 1983, which I may refer to as Section 1983, alleging
14:28:29 19 that Mr. Pierce violated Mr. Szubielski's First Amendment
14:28:32 20 rights by retaliating against him.

14:28:36 21 Mr. Szubielski alleges that he participated as
14:28:40 22 an exemplar in a lawsuit against the Delaware Department of
14:28:43 23 Corrections, challenging the use of solitary confinement to
14:28:50 24 house prisoners suffering from mental disease. An exemplar
14:28:52 25 means that the court papers in that case described

14:28:59 1 Mr. Szubielski's time classified in the most restrictive
14:29:03 2 maximum security housing unit, the solitary housing unit,
14:29:08 3 the SHU, and his mental health treatment throughout that
14:29:13 4 period.

14:29:14 5 Mr. Szubielski claims that as a result of
14:29:18 6 Mr. Szubielski serving as an exemplar, Mr. Pierce retaliated
14:29:23 7 against him by ignoring the recommendation of prison staff
14:29:27 8 to reclassify Mr. Szubielski to medium security by vetoing
14:29:34 9 his reclassification issue. Mr. Pierce contends that he did
14:29:39 10 not retaliate against Mr. Szubielski for his participation
14:29:43 11 as an exemplar in a lawsuit, nor for any other First
14:29:48 12 Amendment reasons.

14:29:48 13 Mr. Pierce contends that at the time he vetoed
14:29:54 14 Mr. Szubielski's reclassification, he was unaware of
14:29:57 15 Mr. Szubielski's participation in a lawsuit as
14:30:00 16 Mr. Szubielski was not identified by name in the lawsuit,
14:30:03 17 and Mr. Pierce had not seen a copy of the lawsuit at the
14:30:07 18 time of the veto. Mr. Pierce contends that he vetoed
14:30:11 19 Mr. Szubielski's reclassification to medium security for
14:30:16 20 other reasons.

14:30:17 21 I will give you detailed instructions on the law
14:30:22 22 at the end of the case and those instructions will control
14:30:25 23 your deliberations and decision. But, in order to help you
14:30:30 24 follow the evidence, I will now give you a brief summary of
14:30:33 25 the elements which plaintiff must prove to make its case.

14:30:38 1 Mr. Szubielski is suing under Section 1983, a
14:30:42 2 civil rights law passed by congress that provides the remedy
14:30:46 3 to persons who have been deprived of their federal
14:30:50 4 constitutional rights under color of state law. To prevail,
14:30:54 5 Mr. Szubielski must prove that while acting under the color
14:30:58 6 of state law, Mr. Pierce deprived Mr. Szubielski of a
14:31:03 7 federal constitutional right.

14:31:05 8 To succeed under this claim, under section 1983,
14:31:09 9 Mr. Szubielski must prove the following by a preponderance
14:31:15 10 of the evidence. First, Mr. Szubielski must prove that he
14:31:18 11 engaged in constitutionally protected conduct, a person's
14:31:24 12 right to sue. Lawsuit is conduct that is protected by the
14:31:29 13 constitution.

14:31:29 14 Second, Mr. Szubielski must demonstrate that he
14:31:32 15 suffered as adverse action. An adverse action is an action
14:31:36 16 that deters an ordinary person from engaging in
14:31:43 17 constitutionally protected conduct.

14:31:45 18 Third, Mr. Szubielski must show that the
14:31:48 19 protected conduct was a substantial or motivating factor in
14:31:52 20 the prison official's decision to take an adverse action.

14:31:52 21 Again, I will give you detailed instructions on
14:31:52 22 the law at the end of the case.

14:32:02 23 Now, a few words about your conduct as jurors.
14:32:02 24 First, I instruct you that during the trial and until you
14:32:10 25 have heard all of the evidence and retired to the jury room

14:32:14 1 to deliberate, you are not to discuss the case with anyone,
14:32:17 2 not even amongst yourselves. If anyone should try to talk
14:32:22 3 to you about the case, including a fellow juror, bring it to
14:32:25 4 my attention promptly. There are good reasons for this ban
14:32:28 5 on discussion, the most important being the need for you to
14:32:31 6 keep an open mind through the presentation of evidence.

14:32:35 7 I know that many of you use cell phones, smart
14:32:39 8 phones and other portable electronic devices, laptop, tablet
14:32:45 9 and other computers both portable and fixed and other groups
14:32:48 10 of technologies to access the internet and communicate with
14:32:51 11 others. You must not talk to anyone about this case or use
14:32:54 12 a tool to communicate electronically about this case. This
14:33:00 13 includes your family and friends. You may not communicate
14:33:03 14 orally about the case on your cell phone, smartphone or
14:33:06 15 portable or fixed computer or device of any kind or use
14:33:10 16 these devices to communicate electronically by messages or
14:33:15 17 postings at any time, including e-mail, instant message,
14:33:18 18 text, services such as Twitter or through any blog, website,
14:33:21 19 internet chatroom or by way of any other social networking
14:33:24 20 site or services including Facebook, LinkedIn, SnapChat,
14:33:27 21 YouTube. If any lawyer, party, or witness does not speak to
14:33:30 22 you when you pass in the hall, ride the elevator or the
14:33:33 23 like, remember, it is because he or she is not supposed to
14:33:36 24 talk or visit with you, either. That is why you are asked
14:33:39 25 to wear your juror tag, it shows that you are someone who is

not to be approached in any way.

Second, do not read or listen to anything related to this case that is not admitted into evidence. By that I mean if there is a newspaper article or radio or television report related to this case, do not read the article or watch or listen to the report. In addition, do not try to do anything independently or do an investigation on your own on matters related to the case, the parties in this case or the type of case. Do not use party or witnesses involved with this case. You are to decide the case upon the evidence produced at trial. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case, or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Again, do not reach any conclusion on the plaintiff or the defendant until all of the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

Finally, if any member of the jury has a friend or family member who is in attendance at this public trial, that visitor must first register with my Court because of special rules. You may not discuss any aspect of this trial with a visitor nor may I permit the visitor to discuss it

14:35:30 1 with you.

14:35:30 2 I will also inform you as to those general rules
14:35:36 3 that will govern the discharge of your duties as jurors in
14:35:40 4 this case. It will be your duty to find from the evidence
14:35:44 5 what the facts are. You, and you alone, will be the judges
14:35:48 6 of the facts. You will then have to apply those facts to
14:35:52 7 the law as I will give it to you both during these
14:35:56 8 preliminary instructions and at the close of the evidence.
14:35:59 9 You must follow that law whether you agree with it or not.
14:36:04 10 Again, of course, you are bound by your oath as jurors to
14:36:08 11 follow these and all the instructions that I give you, even
14:36:10 12 if you personally disagree with them. All the instructions
14:36:14 13 are important and you should consider them together as a
14:36:16 14 whole. Perform these duties fairly. Do not let bias,
14:36:21 15 sympathy, or prejudice that you may feel toward one side or
14:36:26 16 the other influence your decision in any way.

14:36:29 17 Also, do not let anything that I may say or do
14:36:32 18 during the course of the trial influence you. Nothing that
14:36:35 19 I may say or do is intended to indicate, or should be taken
14:36:40 20 by you as indicating what your verdict should be.

14:36:42 21 During the trial it may be necessary for me to
14:36:45 22 talk with the lawyers out of your hearing by having a bench
14:36:48 23 conference. If that happens, please be patient. We are not
14:36:52 24 trying to keep important information from you. These
14:36:55 25 conferences are necessary for me to fulfill my

responsibility which is to be sure that evidence is presented to me correctly under the law.

We will, of course, do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying my granting of a conference as my opinion of the case or what your verdict should be.

The evidence from which you are to find the facts consist of the following:

1. The testimony of the witnesses or reference transcript;
2. Documents or other things such as exhibits;
3. Any facts that are stipulated, that is formally agreed to by the parties; and
4. Any facts that are traditionally noticed, that is facts I say you must accept as true even without other evidence.

The following things are not evidence:

1. Statements, arguments and questions of the lawyers to the parties in this case;
2. Objections by lawyers;
3. Any testimony I tell you to disregard; and
4. Anything you may see or hear about this case outside of the courtroom.

14:38:16 1 You must make your decision based only on the
14:38:19 2 evidence that you see and hear in court. Do not let rumor,
14:38:22 3 suspicions or anything else you may see or hear from outside
14:38:26 4 of court influence your decision in any way. You should use
14:38:31 5 your common sense in weighing the evidence. Consider it in
14:38:35 6 light of your every day experience with people and events
14:38:39 7 and give it whatever weight you believe it deserves. If
14:38:41 8 your experience tells you that certain evidence reasonably
14:38:45 9 leads to a conclusion, you are free to reach that
14:38:48 10 conclusion.

14:38:48 11 There are rules that control what can be
14:38:50 12 received into evidence. When a lawyer ask a question or
14:38:54 13 offers an exhibit into evidence and the lawyer on the other
14:38:58 14 side thinks that it is not permitted by the rules of
14:39:01 15 evidence, that lawyer may object. This simply means that
14:39:04 16 the lawyer is asking I make a decision on a particular rule
14:39:08 17 of evidence. You should not be influenced by the fact that
14:39:14 18 an objection is made. Objections to question are not
14:39:17 19 evidence. Lawyers have an obligation to their clients to
14:39:21 20 make objections when they believe that evidence being
14:39:24 21 offered is improper under the rules of evidence.

14:39:27 22 You should not be influenced by the objections
14:39:30 23 or by the Court's ruling on it. If the objection is
14:39:33 24 sustained, ignore the question. If it is overruled, if you
14:39:42 25 are instructed that some item of evidence is received for a

14:39:44 1 limited purpose only, you must follow that instruction.

14:39:47 2 Also, certain testimony or other evidence may be ordered

14:39:52 3 struck from the record and you will be instructed to

14:39:55 4 disregard this evidence. Do not consider any testimony or

14:39:59 5 other evidence that gets struck or excluded. Do not

14:40:04 6 speculate about what a witness might have said or what an

14:40:08 7 exhibit might have shown.

14:40:09 8 Do not be concerned about whether evidence is

14:40:13 9 direct evidence or circumstantial evidence. You should

14:40:17 10 consider and weigh all of the evidence that is presented to

14:40:21 11 you. If your experience tells you that certain evidence

14:40:24 12 reasonably leads to a conclusion, you are free to reach that

14:40:29 13 conclusion.

14:40:30 14 In deciding what the facts are, you may have to

14:40:35 15 decide what testimony you believe and what testimony you do

14:40:38 16 not believe. You are the sole judges of the credibility of

14:40:41 17 the witnesses. You may believe everything a witness says,

14:40:46 18 only part of it, or none of it. In deciding what to

14:40:50 19 believe, you may consider a number of factors including the

14:40:53 20 following:

14:40:56 21 1. The opportunity and ability of the witness

14:40:59 22 to see, hear, or know the things that the witness testifies

14:41:02 23 to;

14:41:05 24 2. The quality of the witness' understanding or

14:41:08 25 memory;

14:41:07 1 3. The witness' manner while testifying;

14:41:11 2 4. Whether the witness has an interest in the
14:41:14 3 outcome of the case or any motive, bias or prejudice;

14:41:18 4 5. Whether the witness is contradicted by
14:41:22 5 anything the witness said or wrote before trial or by other
14:41:26 6 evidence;

14:41:27 7 6. How reasonable the witness's testimony is
14:41:31 8 when considered in the light of other evidence that you
14:41:34 9 believe; and

14:41:36 10 7. Any other factors that bear on
14:41:39 11 believability.

14:41:40 12 A deposition is the sworn testimony of a witness
14:41:45 13 taken for trial. The witness is placed under oath and
14:41:48 14 swears to tell the truth, and lawyers for each party may ask
14:41:52 15 questions. A court reporter is present and records the
14:41:55 16 questions and answers. Deposition testimony is entitled to
14:41:58 17 the same consideration and is to be judged insofar as
14:42:01 18 possible in the same way as if the witness had been present
14:42:04 19 and testified. Do not place any significance on the
14:42:10 20 behavior or tone of voice of any person reading the
14:42:15 21 questions and answers. Only the lawyers and I are allowed
14:42:20 22 to ask questions of witnesses. You are not permitted to ask
14:42:25 23 questions of witnesses.

14:42:28 24 During the trial, I will permit you to take
14:42:32 25 notes. A word of caution is in order. There is always a

14:42:36 1 tendency to attach undue importance to matters which one has
14:42:41 2 written down. Some testimony which is considered
14:42:44 3 unimportant at the time presented and thus not written down
14:42:47 4 takes on greater importance later in the trial in light of
14:42:51 5 all the evidence presented. Therefore, you're instructed
14:42:55 6 that your notes are only a tool to aid your own individual
14:42:59 7 memory. You should not compare your notes with other
14:43:02 8 jurors' concept of any testimony or evaluating the
14:43:07 9 importance of any evidence. Your notes are not evidence and
14:43:10 10 are by no means a complete outline of the proceedings or a
14:43:13 11 list of the highlights of the trial. Above all, your memory
14:43:17 12 should be your greatest asset when it comes time to deliver
14:43:21 13 and render a decision in this case. If you do take notes,
14:43:25 14 leave them in your seats. At the end of the day my deputy
14:43:29 15 will collect them and return them to your seat the next day.
14:43:32 16 Remember, they are only for your own personal use.

14:43:36 17 I will give you detailed instructions on the law
14:43:39 18 at the end of the case and those instructions will control
14:43:41 19 your deliberations.

14:43:45 20 This is a civil case. Mr. Szubielski is a party
14:43:50 21 that brought this lawsuit. Mr. Pierce is a party against
14:43:54 22 whom the lawsuit was filed. Mr. Szubielski has a burden of
14:43:58 23 proving the claims of his case by what is called the
14:44:02 24 preponderance of the evidence. That means Mr. Szubielski
14:44:06 25 has to prove to you that in light of all the evidence, what

14:44:09 1 he claims to be true is more likely than not true. To say
14:44:15 2 it differently, if you were to put the evidence favorable to
14:44:20 3 Mr. Szubielski and the evidence favorable to Mr. Pierce on
14:44:24 4 opposite sides of the scales of justice, Mr. Szubielski
14:44:29 5 would have to make the scales tip somewhat slightly to his
14:44:34 6 side. If Mr. Szubielski fails to meet this burden, the
14:44:38 7 verdict must be for Mr. Pierce. If Mr. Szubielski meets the
14:44:41 8 burden, the verdict must be for him.

14:44:43 9 If you find after considering all the evidence
14:44:46 10 that a claim or fact is more likely so than not so, then the
14:44:51 11 claim or fact has been proving by a preponderance of the
14:44:55 12 evidence.

14:44:58 13 In determining whether any facts has been proved
14:44:59 14 by a preponderance of the evidence in the case, you may
14:45:03 15 unless otherwise instructed consider the testimony of all
14:45:06 16 witnesses, regardless of who may have called them, and all
14:45:11 17 exhibits received in evidence, regardless of who may have
14:45:15 18 produced them. On certain issues, called affirmative
14:45:19 19 defenses, a defendant has the burden of proving the elements
14:45:24 20 of the defense by a preponderance of the evidence. If
14:45:27 21 Mr. Pierce asserts an affirmative defense, I will instruct
14:45:32 22 you on the facts that will be necessary for you to find on
14:45:35 23 this affirmative defense. An affirmative defense is proven
14:45:39 24 if you find after considering all evidence in the case that
14:45:42 25 Mr. Pierce has succeeded by proving that the required facts

are more likely so than not so.

You may have heard of the term proof beyond a reasonable doubt. That is a stricter standard of proof and it applies only in criminal cases. It does not apply in civil cases. And as such, you should put it out of your mind.

The trial will proceed in the following manner. First, the attorney for Mr. Szubielski will make his opening statement to you. Next, the attorney for Mr. Pierce will make an opening statement. What is said in opening statement is not evidence, but is simply an outline to help you understand what each party expects the evidence to show.

Once the attorneys have made their opening statement, each party is given an opportunity to present its evidence. Mr. Szubielski goes first because Mr. Szubielski has the burden of proof. Mr. Szubielski will present witnesses who counsel for Mr. Pierce may cross-examine. And Mr. Szubielski may also present evidence such as documents and testimony.

Following Mr. Szubielski's case, Mr. Pierce may present evidence. Counsel for Mr. Szubielski may cross-examine witnesses for the defense. After the party's main case is presented, they may be permitted to present what is called rebuttal evidence.

After all the evidence has been presented, I

14:47:12 1 will again instruct you on the law and then the attorneys
14:47:15 2 will present to you closing arguments to summarize in a way
14:47:22 3 that is helpful to their client's position. As with opening
14:47:25 4 statements, closing arguments are not evidence, but rather
14:47:31 5 evidence of the case from the perspective of each party.

14:47:35 6 Once the closings arguments are completed, I
14:47:39 7 will then instruct you on the law for a final time. After
14:47:43 8 that, you will retire to the jury room to deliberate on your
14:47:46 9 verdict in this case.

14:47:48 10 So you have heard me say this during voir dire.
14:47:54 11 I want to again outline the schedule I expect to maintain
14:47:57 12 during the course of the trial. This case is expected to
14:48:00 13 take three days to try. We will normally begin a day at
14:48:05 14 9:00 a.m. promptly. So I may have said during voir dire
14:48:10 15 that we anticipated starting at 9:30 tomorrow, but we are
14:48:15 16 going to try to start at 9:00 a.m., we will go until
14:48:19 17 approximately 1:00 p.m. and after a one-hour break we'll
14:48:23 18 return from 2:00 p.m. to 4:30 p.m., there will be a
14:48:27 19 fifteen-minute break at morning and another fifteen minute
14:48:30 20 break at afternoon. The only significant exception to this
14:48:34 21 schedule may occur when the case is submitted to you for
14:48:37 22 deliberation. On that day, the proceedings might last
14:48:40 23 beyond 5:00 p.m.

14:48:42 24 We will post a copy of your schedule for your
14:48:45 25 convenience in your jury room. Please keep in mind this is

14:48:51 1 a timed trial. That means I have allocated each party a
14:48:55 2 maximum number of hours in which to present all portions of
14:48:58 3 its case. That allows me to assure you that this case is
14:49:02 4 expected to be completed by Monday. In fact, you can help
14:49:04 5 us stay on schedule by getting here promptly each morning
14:49:09 6 and being ready to proceed at the end of each break.

14:49:12 7 And with that, I will release you for the day.
14:49:20 8 We will see you back here at 9:00 a.m. tomorrow. We'll
14:49:25 9 anticipate getting started bright and early with opening
14:49:29 10 statements.

14:49:33 11 Ms. Garfinkel, you may take the jury out.

14:49:37 12 (Jury leaving the courtroom at 2:49 p.m.)

14:49:51 13 THE COURT: Please be seated. Is there anything
14:50:11 14 else we need to address this afternoon?

14:50:14 15 MS. CLINE: Just one more question. So as I
14:50:18 16 understand it, tomorrow we're going to flip so we'll be over
14:50:22 17 here with Jerry, and the question about how he is going to
14:50:26 18 be escorted or how he is going to transport himself to the
14:50:30 19 witness box in front of the jury.

14:50:34 20 THE COURT: We did wonder about that. There is
14:50:38 21 a couple of possibilities and I would be open to hear
14:50:42 22 counsel's position on them. If you wanted to have him walk
14:50:46 23 up to the jury box, we can have the jury here and when you
14:50:50 24 call him, we can find out from whoever has custody of this
14:50:54 25 person how they can safely get him up there. The other

14:50:49 1 possibility is if you wanted, we could send the jury out and
14:50:55 2 have him situated and then have him already up on the stand
14:50:58 3 and bring the jury back in.

14:51:00 4 MS. CLINE: Do you know whether he'll be
14:51:03 5 shackled at the wrist or the feet?

14:51:05 6 THE COURT: I unfortunately don't know that.

14:51:07 7 Ms. McCowan?

14:51:09 8 MS. MCCOWAN: I believe he will.

14:51:10 9 THE COURT: Be shackled at both his wrist and
14:51:12 10 his feet?

14:51:13 11 MS. CLINE: During testimony as well.

14:51:15 12 MS. MCCOWAN: I would assume so.

14:51:20 13 MS. CLINE: May I consult?

14:51:22 14 THE COURT: Yes.

14:51:38 15 MS. CLINE: Your Honor, so we are -- if it
14:51:41 16 pleases the Court, I think it would be best if
14:51:44 17 Mr. Szubielski was brought to the stand before the jury was
14:51:47 18 brought in. And then just a related question. We had
14:51:50 19 spoken with Judge Andrews about getting him a long sleeve
14:51:52 20 T-shirt to cover up the tats and I don't know how it's going
14:51:52 21 to work with handcuffs, but we were hoping to meet with him
14:52:01 22 before the trial started so he can put that on.

14:52:03 23 THE COURT: I do remember seeing that in the
14:52:05 24 transcript.

14:52:06 25 Ms. McCowan, do you have an understanding of how

14:52:09 1 we can proceed with that?

14:52:10 2 MS. McCOWAN: From what I understand, I don't
14:52:13 3 know that we were aware that you were going to be giving him
14:52:16 4 one. I think he may have already had one.

14:52:20 5 MR. SHIEKMAN: Excuse me. I met with him.
14:52:21 6 Larry Shiekman, also for Mr. Szubielski. I met with him at
14:52:26 7 the prison yesterday. He does not have a T-shirt. We have
14:52:29 8 one here. We're happy to give it to the lawyers and they
14:52:33 9 can make arrangements, we're happy to deliver it to the
14:52:35 10 marshals now and they can search it. It's in a Target bag
14:52:39 11 from which someone purchased it for him.

14:52:41 12 THE COURT: I'm wondering whether, because I
14:52:44 13 assume they can unshackle him when he's in the holding cell,
14:52:48 14 I wouldn't think he would be shackled the whole time when
14:52:52 15 he's done here, so I could be wrong about that.

14:52:54 16 MS. McCOWAN: I'm not sure.

14:52:55 17 THE COURT: It is my understanding that Judge
14:52:58 18 Andrews issued an order that was permitting this, so we need
14:53:01 19 to try to figure out a way to make it happen. I prefer not
14:53:04 20 to reopen it, but we don't have enough information right
14:53:07 21 now.

14:53:10 22 MR. WAN: If they're able, hopefully we can try
14:53:13 23 to coordinate. They should be able to speak with them
14:53:16 24 tomorrow morning I think before trial, so maybe at that
14:53:19 25 time, or maybe now bring it to the marshals, okay, he's

14:53:23 1 supposed to wear this long sleeve shirt. I'm only speaking
14:53:27 2 from my experience from state court where we go down to
14:53:30 3 speak with prisoners, they want some type of exchange there,
14:53:34 4 I don't know how it is with U.S. Marshals.

14:53:37 5 THE COURT: If there is a question about that,
14:53:39 6 we can take it up tomorrow morning if it becomes an issue,
14:53:42 7 and we can bring the folks in here and see if there is some
14:53:45 8 way we can work this out. It seems to me, and again, I'm
14:53:48 9 not a federal agent, I don't know what their plan is, but it
14:53:51 10 seems to me if he's unshackled and in the cell in the
14:53:54 11 morning there ought to be some kind of opportunity to do a
14:53:57 12 quick change, but we'll take it up tomorrow.

14:54:00 13 MR. SHIEKMAN: I'll go down as soon as court is
14:54:03 14 over today and explain to the marshal what we're doing. I
14:54:06 15 can leave the T-shirt with them or bring it back.

14:54:09 16 THE COURT: All right. So what might make the
14:54:12 17 most sense is for us to plan on doing the opening statements
14:54:15 18 right in the morning and then taking a quick break.

14:54:20 19 Do we have a sense, and you don't have to tell
14:54:23 20 me, about how long the opening statements are going to take
14:54:26 21 for each side?

14:54:29 22 MS. MUNNINGS: About thirty minutes, Your Honor.

14:54:32 23 THE COURT: Okay.

14:54:35 24 MR. WAN: Five minutes.

14:54:38 25 THE COURT: Okay. All right. Well, we'll take

14:54:38 1 a quick brief break after those are done if he intends to be
14:54:43 2 your first witness.

14:54:44 3 I don't have a recollection if there was a
14:54:47 4 ruling in the pretrial order about exchange of opening
14:54:53 5 statement slides or exhibits the night before. Do you have
14:54:58 6 slides and is there going to be an exchange to the other
14:55:01 7 side?

14:55:01 8 MS. MUNNINGS: We do not anticipate using
14:55:04 9 slides.

14:55:04 10 THE COURT: Does the state?

14:55:05 11 MR. WAN: No, Your Honor.

14:55:06 12 THE COURT: That makes things easy. Very good.
14:55:09 13 All right. Anything else?

14:55:12 14 MS. SONG: Your Honor, there is one matter about
14:55:14 15 impeachment evidence. We all know Mr. Szubieliski has a
14:55:23 16 record, and I had provided written notice to plaintiff's
14:55:26 17 counsel on the use of conviction record, I wasn't sure if
14:55:31 18 this was the appropriate time to raise that. I do believe
14:55:35 19 plaintiff's counsel is objecting.

14:55:38 20 THE COURT: Is there going to be an objection to
14:55:40 21 the use of a prior criminal conviction as impeachment.

14:55:42 22 MR. SHIEKMAN: Again, Larry Shiekman. We did
14:55:43 23 respond to Ms. Song in an e-mail, I believe I did last week,
14:55:52 24 and I have not heard from her about discussing -- to discuss
14:55:52 25 that. Why don't we try to discuss it after court today and

14:55:59 1 see if we can reach some agreement. I think in light of how
14:56:02 2 we intend to present the case, it is likely that it will not
14:56:07 3 be an issue, but we ought to have a chance to talk about it
14:56:10 4 first, I think.

14:56:11 5 THE COURT: Very good. I'll ask you to meet and
14:56:14 6 confer and then we'll raise it at 8:30 in the morning if
14:56:18 7 there is still an issue. We're talking about Federal Rule
14:56:21 8 of Evidence 609.

14:56:23 9 MS. SONG: Yes, Your Honor.

14:56:24 10 THE COURT: Very good. Anything else?

14:56:26 11 MS. CLINE: Not from plaintiffs.

14:56:28 12 MR. WAN: I don't think so, Your Honor.

14:56:30 13 THE COURT: All right. I think we can say in
14:56:32 14 hindsight that we probably made the right call in how to
14:56:35 15 proceed today, thinking about everything that's happened. I
14:56:38 16 hope you all get a good night sleep tonight and we'll see
14:56:41 17 everybody in the morning.

14:56:43 18 (Court recessed at 2:56 p.m.)

19
20 I hereby certify the foregoing is a true and
21 accurate transcript from my stenographic notes in the proceeding.

22 /s/ Dale C. Hawkins
23 Official Court Reporter
24 U.S. District Court
25